IN THE

SUPREME COURT OF THE UNITED STATES

MISC. NO. 75-6527

October Term, 1975

JAMES INGRAHAM, by his mother and next friend, ELOISE INGRAHAM and ROOSEVELT ANDREWS, by his father and next friend, WILLIE EVERETT,

Petitioners,

-vs-

WILLIE J. WRIGHT, I; LEMMIE DELIFORD; SOLOMON BARNES; EDWARD L. WHIGHAM and; THE DADE COUNTY SCHOOL BOARD,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

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INDEX

TABLE OF CITATIONS AND OTHER AUTHORITIES

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The Petitioners, by undersigned counsel, respectfully request that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on January 8, 1976.

OPINION BELOW

The opinion of the Court of Appeals, en banc, is reported at 525 F.2d 909. The original panel decision, which held in favor of the Petitioners, is reported at 498 F.2d 248. Copies of both opinions are appended to this Petition.

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JURISDICTION

The judgment of the Court of Appeals was entered on January 8, 1976. This Petition was timely filed. The jurisdiction of this Court is based upon Title 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

I

DOES THE INFLICTION OF SEVERE CORPORAL PUNISHMENT UPON PUBLIC SCHOOL STUDENTS, ABSENT NOTICE OF THE CHARGES FOR WHICH PUNISHMENT IS TO BE INFLICTED AND AN OPPORTUNITY TO BE HEARD, VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT?

II

DOES THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE OF THE EIGHTH AMENDMENT APPLY TO THE ADMINISTRATION OF DISCIPLINE THROUGH SEVERE CORPORAL PUNISHMENT INFLICTED BY PUBLIC SCHOOL TEACHERS AND ADMINISTRATORS UPON PUBLIC SCHOOL CHILDREN?

III

IS THE INFLICTION OF SEVERE CORPORAL PUNISHMENT UPON PUBLIC SCHOOL STUDENTS ARBITRARY, CAPRICIOUS AND UNRELATED TO ACHIEVING ANY LEGITIMATE EDUCATIONAL PURPOSE AND THEREFORE VIOLATIVE OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT?

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIV

...nor shall any state deprive any person of life, liberty or property without due process of law; ....

STATEMENT OF THE CASE

On January 7, 1971, the petitioners filed a three count complaint in the United States District Court for the Southern District of Florida seeking compensatory and punitive damages for personal injuries resulting from corporal punishment administered to them by certain Dade County, Florida public school teachers and administrators. The complaint alleged violations of Title 42 U.S.C. §§1981-1988 and jurisdiction was based upon Title 28 U.S.C. §§1331 and 1343. Count three of the complaint sought declaratory and injunctive relief against the use of corporal punishment in Dade County public schools. All of the federal claims were based upon the alleged denial of Eighth and Fourteenth Amendment rights arising from the infliction of corporal punishment.

The claim for declaratory and injunctive relief was heard in a week long trial before the district court. At the close of the plaintiffs' evidence, which consisted of sixteen students, several parents and relatives of students, an educational psychology professor and a number of school teachers and administrators, in addition to substantial documentary evidence, the defendants successfully moved for dismissal under the pertinent portion of Rule 41(b), Federal Rules of Civil Procedure. 1/

1/ That Section provides: "After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits."

The original panel decision, 498 F.2d at 251 summarizes what transpired next:

> The district court noted in its order that counsel for the parties then agreed that the evidence offered to support County Three "would also be considered by the Court, as if upon motion for directed verdict, as having been offered on Counts One and Two, provided that certain additional testimony desired by Plaintiffs' counsel were placed in the record by deposition or stipulation." Thus, this case really involves one equity case, styled Counts One and Two. The additional testimony was summarized in a stipulation. On February 23, 1973, the district court first dismissed Count Three of the complaint, and then concluded that a jury could not lawfully find that either of the plaintiffs in Counts One and Two sustained a deprivation of constitutional rights.

An appeal was taken to the Fifth Circuit from the order of dismissal.

That appeal resulted in the original panel decision, 498 F.2d 248, which held that the Eighth Amendment's prohibition against cruel and unusual punishment applied to the paddling practiced by the defendants Wright, Deliford and Barnes at Drew Junior High School. The Court also held that those practices violated both procedural and substantive due process. 498 F.2d at 269.

The panel took nearly five pages of its opinion to detail the undisputed facts upon which its conclusions were based. 498 F.2d 255-259. Some examples are set forth below:

> On October 6, 1970, a number of students including fourteen year old James Ingraham, a named plaintiff, were slow in leaving the stage of the school auditorium

> when asked to do so by a teacher. A number of boys and girls involved in this incident were taken to the principal's office and paddled. James protested, claiming he was innocent, and refused to be paddled. Willie J. Wright, I, the principal called for the assistance of Lemmie Deliford, the assistant principal in charge of administration, and Solomon Barnes, an assistant to the principal. Barnes and Deliford held James by his arms and legs and placed him, struggling, face down across a table. Wright administered at least twenty licks. After the paddling, Wright told James to wait outside his office --'he said if I move he was going to bust me on the side of my head' -- but James went home anyway.
>
> 498 F.2d at 255-256 (footnote omitted).

Young Ingraham required repeated medical treatment as a result of the injuries. Eight days after the paddling a doctor advised 72 hours of rest at home. It was three weeks before Ingraham could comfortably sit again. 498 F.2d at 256.

Roosevelt Andrews testified that defendant Barnes, angry at him for a comment:

> "pushed me against the urinate thing, the bowl, and then he snatched me around to it and that's when he hit me first. He first hit me on the backsides and then I stand up and he pushed me against the bathroom wall, them things--that part the bathroom, the wall * * * Between the toilets, he pushed me against that and then he snatched me from the back there and that's when he hit me on my leg, then hit me on my arm, my back and then right across my neck, in the back here."
>
> (Tr. 295.) Incensed over his treatment, Roosevelt complained to Wright, but Wright seemed to support Barnes, his co-administrator.
>
> 498 F.2d at 257.

On another occasion Andrews required medical treatment and lost the use of his arm for a week when paddled and hit on the wrist by Wright. 498 F.2d at 257.

A third boy's testimony was described this way:

> Daniel Lee, who was paddled lots of times (Tr. 463) at Drew, described how on one occasion Barnes had a number of students in a line, holding onto the chair, already paddling them, and asked him to come over and 'get a little piece of the board.' (Tr. 480-481.) Daniel asked what he had done, and Barnes allegedly grabbed him and tried to throw him on the chair. In the ensuing confusion, Barnes hit Daniel on the hand four or five times. The hand swelled and hurt and the bone was--it seems like the bone was going to come out (Tr. 481), so Daniel's mother took him to the hospital for an X-ray. According to Daniel, a bone in his right hand was fractured. The Court, observing Daniel's hand, stated that 'It seems to me to be disfigured, a portion of his right knuckle is enlarged to some degree.' Daniel claimed that his hand still hurt, and swelled if he tried to use it.
>
> 498 F.2d at 257-258.

Not only was paddling a daily event 498 F.2d at 257, but the assistant principals, Deliford and Barnes, were seen carrying brass knuckles. 498 F.2d 257, n. 16.

A complete view of the reign of terror which existed at Drew Junior High School can only be gleaned from the panel description at 255-259.

Finding that the plaintiffs' evidence entitled them to a full trial, the panel reversed the district court's order of dismissal. 498 F.2d 265-266.

Thereafter, the defendants were successful in obtaining an en banc rehearing of the original panel decision. On rehearing, the full Fifth Circuit reversed the panel decision and held, 10-5, that the cruel and unusual punishment clause of the Eighth Amendment had no application to public school discipline whether or not that discipline was "excessively administered." 525 F.2d at 915. The Court also concluded that "procedural safeguards accompanying the use of corporal punishment in public schools are not constitutionally mandated" 525 F.2d at 918, and corporal punishment, having a "real and substantial relation to the object sought to be attained [discipline]", substantive due process was not offended. 525 F.2d at 916-917. The district court's dismissal of the complaint was affirmed.

This Petition for Writ of Certiorari seeks review of that decision.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Presents Important Constitutional Questions Which Have Not Been, But Should Be, Resolved by this Court.

A. The Procedural Due Process Issue.

This Court has held that an Ohio Statute which authorized suspension of public school students for up to ten days without notice of their alleged offenses and an opportunity to be heard violated the students' right to procedural due process under the Fourteenth Amendment. Goss v. Lopez, 419 U.S. 565 (1975). The Court found that the students had a substantial property right to their education and that the right could not be withdrawn, even temporarily, absent minimal due

process protections. However, the Court has not decided if public school students, faced with a deprivation of substantial rights to liberty - the rights to be free from severe physical and emotional punishment - must also be accorded due process protections.

In Baker v. Owen, ___U.S.___, 96 S.Ct. 210, 46 L.Ed.2d 137 (1975) the Court's summary affirmance without opinion was limited to that portion of the lower court's judgment which held that the North Carolina Statute permitting reasonable corporal punishment of public school students over parental objection was valid.[2/] The issues of procedural due process, which the three-judge court resolved in favor of the students, Baker v. Owen, 395 F.Supp. 294 (M.D. N.C. 1975), were not before this Court. Therefore the important constitutional question of what process is due a public school student upon whom severe corporal punishment is inflicted has not been decided by the Court. This case presents that issue.

B. The Cruel and Unusual Punishment Issue.

The Court has not decided if the Eighth Amendment's prohibition against cruel and unusual punishment applies to the infliction of discipline to public school children through severe corporal punishment. The lower court in Baker v. Owen did not reach the cruel and unusual issue, saying:

> In short, this record does not begin to present a picture of punishment comparable to that in Ingraham [v. Wright, 498 F.2d 248] at 255-259, or in Nelson v. Hyne, 491 F.2d 352 (7th Cir. 1974), which we believe indicate the kinds of beatings that could constitute cruel and unusual punishment if the eighth amendment is indeed applicable.
>
> 395 F.Supp. at 303.

Thus, this Court's summary affirmance cannot be interpreted as a resolution of whether or not the Eighth Amendment has application in a public school setting. The en banc Fifth Circuit decision in Ingraham squarely held that it did not. That important constitutional matter should now be decided by this Court.

2. The Decision Below Conflicts With The Decisions Of Other Courts Of Appeals And Federal District Courts.

A. The Cruel and Unusual Punishment Issue.

The en banc Fifth Circuit decision in this case squarely conflicts with the Eighth Circuit decision in Bramlett v. Wilson, 495 F.2d 714 (8th Cir. 1974). Bramlett concluded that the Eighth Amendment does apply to excessive corporal punishment in public schools. The Court below held that it did not apply to any corporal punishment in public schools, excessive or not.

A conflict is also presented with the Seventh Circuit decision in Nelson v. Hyne, 491 F.2d 352 (7th Cir. 1974), cert. denied, 417 U.S. 976 (1974). Nelson involved corporal punishment used in a state correctional school, one-third of whose students were "non-criminal offenders." 491 F.2d at 353. Drawing

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2/ The question presented by the plaintiffs' appeal was:

> Does constitutional concept of familial privacy bar school officials from whipping school children over parental objection?
>
> Baker v. Owen, No. 75-279, 44 L.W. 3142.

no distinction between the criminal and non-criminal residents of the school, the Nelson court applied the Eighth Amendment to the school's practice of paddling its students. 491 F.2d at 354-355.[3/]

There have also been several federal court decisions which assume, without deciding, that the Eighth Amendment applies to the imposition of corporal punishment in public schools. Baker v. Owen, 395 F.Supp. 294 (M.D. N.C. 1975), aff'd ___U.S.____, 96 S.Ct. 210, 46 L.Ed.2d 137 (1975); Glaser v. Marietta, 351 F.Supp. 555 (W.D. Pa. 1972); Ware v. Estes, 328 F.Supp. 657 (N.D. Tex. 1971), aff'd per curiam, 458 F.2d 1360 (5th Cir. 1972); Whatley v. Pike County Board of Education, Civil Action No. 977 (N.D. Ga. 1971) (three-judge court); and Sims v. Board of Education, 329 F.Supp. 678 (D. N.M. 1971).

Finally, two district courts have held that the Eighth Amendment does not apply to corporal punishment in public schools. Sims v. Waln, 388 F.Supp. 543 (S.D. Ohio 1974) and Gonyaw v. Gray, 361 F.Supp. 366 (D. Vt. 1973).

The varying opinions of numerous federal courts (and judges) buttress the argument that this Court should grant certiorari to resolve the ongoing conflict over the place of the Eighth Amendment in public schools.

3/ We recognize that if an Eighth Amendment distinction can be made between discipline in public schools and correctional facilities, Nelson is not a direct conflict with the en banc decision here. The en banc majority did subscribe to that distinction. 525 F.2d at 914-915. We believe the distinction to be invalid.

B. The Procedural Due Process Issue.

The decision below is in plain conflict with the three-judge court decision in Baker v. Owen, 395 F.Supp. at 301-303, which makes minimum procedural due process safeguards the sine qua non for imposing mild corporal punishment. The Baker court reached that ruling by looking to Goss v. Lopez, 419 U.S. 565 (1975). The court below found Goss unpresuasive. Therefore we turn to the third reason why certiorari should be granted, the conflict between the en banc holding and the decisions of this Court in Goss and other cases.

3. The Decision Below Conflicts With The Decisions of This Court.

A. The Procedural Due Process Issue.

The defendants in this case conceded that "corporal punishment in the public schools of Dade County, Florida, is a last resort means of discipline as an alternative to suspension or expulsion.... Defendants' Brief, p. 17, 498 F.2d at 267; 525 F.2d at 925. They placed the loss of liberty attendant to corporal punishment above the loss of property inherent in temporary suspensions from school. On that point the defendants were correct. The words of the due process clause, protecting "life, liberty, or property" denote the views of the founding fathers on the hierarchy of rights entitled to constitutional protection. Goss v. Lopez, 419 U.S. 565 (1975) protected the property right of an education from temporary loss unless minimal due process procedures were present. The court below did not believe that severe corporal punishment triggered the right to procedural due process. 525 F.2d at 917. Implicit in Goss must be the concept that liberty - freedom from severe physical punishment at

the hands of the state - requires due process safeguards. The denial of that concept by the en banc court thus conflicts with Goss.

It also conflicts with portions of Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971) and Board of Regents v. Roth, 408 U.S. 564, 558 (1972), cited with approval in Goss. 419 U.S. at 574-575. Those cases mandated that "where a person's good name, reputation, honor or integrity is at stake because of what the Government is doing to him," notice and an opportunity to be heard are essential. The decision below simply asserted that a paddling "is certainly a much less serious event in the life of a child than is a suspension or expulsion." 525 F.2d at 919 (footnote omitted). Certainly the plaintiffs, who sought judicial relief for the beatings inflicted upon them, did not agree. But it is for this court to decide if the stigma and pain of corporal punishment is due fewer safeguards than being posted as an excessive drinker. Cf. Wisconsin v. Constantineau, 400 U.S. 433 (1971). The conflict is apparent and should be resolved.

B. The Substantive Due Process Issue.

This Court has held that where state action invades fundamental liberties it will be subjected to "strict scrutiny" by the courts, Skinner v. Oklahoma, 316 U.S. 535, 541 (1941), and will not be upheld simply on the showing that the statute has some rational relationship to the proper state purpose. Griswold v. Connecticut, 381 U.S. 479, 497 (Goldberg, J., concurring) (1965). The State may prevail only upon showing a compelling, subordinating interest, Bates v. City of Little Rock, 361 U.S. 516, 524 (1960). Moreover, governmental action which broadly invades areas of constitutionally protected rights "must be viewed in the light of less drastic means for achieving the same basic purpose", Shelton v. Tucker, 364 U.S. 479, 488 (1960) (footnote omitted).

Of course, none of those cases, which forge the concept of "substantive due process", relate to the precise issue presented by this case. But inherent in those decisions is the belief that governmental actions must not be arbitrary and unsuited to their purpose. To the extent that the court below held that no matter how severe or excessive, corporal punishment is not arbitrary and is always suited to its purpose, the decision conflicts with a long line of constitutional theory explicated by this Court.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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April, 1975

A P P E N D I X

firm which disenfranchise a minority that fails to register. What we have held is that the tactic underlying the Texas annual voter registration system, which sought to win the war for representative government by inflicting devastating losses on its electoral army before it ever marched off to the polls, is inconsistent with the United States Constitution. The mass disenfranchisement may have been unintentional, but it was nevertheless the consequence of the law. The judgment of the District Court declaring unconstitutional the statutory provisions prescribing limited registration time periods and the requirement for annual voter registration was correct. The effect of this is to leave intact the 1971 amendments. See notes 6 and 7, supra.

Affirmed.

Eloise INGRAHAM, as next friend, etc., et al., Plaintiffs-Appellants,

v.

Willie J. WRIGHT, I, Individually, etc., et al., Defendants-Appellees.

No. 73-2078.

United States Court of Appeals, Fifth Circuit.

July 29, 1974.

Action was brought by parents seeking compensatory and punitive damages and declaratory and injunctive relief as to use of corporal punishment in county school system. The United States District Court for the Southern District of Florida, Joe Eaton, J., dismissed the action, and plaintiffs appealed. The Court of Appeals, Rives, Circuit Judge, held that three-judge court was not required, that superintendent of schools sued in his individual capacity was a "person" within the Civil Rights Act, and that evidence established that use of corporal punishment at one school violated prohibition against cruel and unusual punishment and due process.

Reversed and remanded.

Lewis R. Morgan, Circuit Judge, filed dissenting opinion.

1. Civil Rights ⇐13.7

School superintendent, sued as individual, is a "person" within meaning of Civil Rights Act. 42 U.S.C.A. § 1983.

2. Civil Rights ⇐13.11

If plaintiffs in civil rights action seeking injunctive and declaratory relief against use of corporal punishment in county school system request to add individual members of school board as parties defendant, such request should be granted. 42 U.S.C.A. § 1983; Fed. Rules Civ.Proc. rule 21, 28 U.S.C.A.

3. Courts ⇐405(2)

Even though parties to appeal did not raise issue, Court of Appeals would consider whether complaint seeking declaratory and injunctive relief relating to use of corporal punishment in county school system should have been heard by three-judge court. 28 U.S.C.A. § 2281; 42 U.S.C.A. § 1983; West's F.S.A. § 232.27.

4. Courts ⇐101.5(2)

Consent, either implied or express, cannot authorize single judge to hear case that falls within statute relating to impaneling three-judge court to hear case seeking injunction against enforcement of state law. 28 U.S.C.A. § 2281.

5. Courts ⇐101.5(2)

Where plaintiffs in civil rights action seeking declaratory and injunctive relief as to use of corporal punishment in county school system did not seek to enjoin enforcement of any specific state statute but merely sought to enjoin use of corporal punishment on students in particular county, case was not required to be heard by three-judge court. 28 U.S.C.A. § 2281; 42 U.S.C.A. § 1983; West's F.S.A. § 232.27.

6. Constitutional Law ⇐270

Eighth Amendment prohibition against cruel and unusual punishment is applicable to states through due process clause of Fourteenth Amendment. U.S.C.A.Const. Amends. 8, 14.

7. Criminal Law ⇐1213

Punishments devised by school officials are subject to Eighth Amendment scrutiny. U.S.C.A.Const. Amend. 8.

8. Criminal Law ⇐1213

At present time, corporal punishment per se cannot be ruled violative of Eighth Amendment. U.S.C.A.Const. Amend. 8.

9. Criminal Law ⇐1213

Scope of Eighth Amendment is not static and must draw its meaning from evolving standards of decency. U.S.C.A.Const. Amend. 8.

10. Criminal Law ⇐1213

Specific policies on corporal punishment promulgated by county school board did not violate Eighth Amendment. U.S.C.A.Const. Amend. 8.

11. Schools and School Districts ⇐176

While evidence was insufficient to establish that actual practice of corporal punishment in county school system as a whole violated the Eighth Amendment, evidence as to pattern, practice and uses of corporal punishment at one junior high school was such that dismissal of suit seeking compensatory and punitive damages and declaratory and injunctive relief was error. 42 U.S.C.A. §§ 1981–1988, 1983; U.S.C.A.Const. Amend. 8; Fed.Rules Civ.Proc. rule 41(b), 28 U.S.C.A.; West's F.S.A. § 232.27.

12. Criminal Law ⇐1213

Violation of Eighth Amendment can occur at level of single educational institution even though there may be no violation at other institutions in same district. U.S.C.A.Const. Amend. 8.

13. Civil Rights ⇐13.13(3)

Evidence, in suit seeking damages and injunctive and declaratory relief as to use of corporal punishment in county school system, established that punishment meted out at particular school was of nature likely to cause serious physical and psychological damages and was sometimes arbitrary. 42 U.S.C.A. § 1983.

14. Criminal Law ⇐1213

Whether punishment is cruel and unusual in constitutional sense depends to significant degree on circumstances surrounding particular punishment. U.S.C.A.Const. Amend. 8.

15. Civil Rights ⇐13.4(6)

Specific intent to deprive person of his constitutional rights is not necessary to maintain civil rights action. 42 U.S.C.A. § 1983.

16. Federal Civil Procedure ⇐2061, 2071

Where suit contained three counts with counts one and two seeking compensatory and punitive damages and equity count three seeking declaratory and injunctive relief as to use of corporal punishment in county school system, and counts seeking compensatory and punitive damages continued to be for jury trial, issues of fact common to all three counts must first be heard and determined by jury's verdict rendered on one or both of first or second count.

17. Criminal Law ⇐1213

There is some question as to whether Eighth Amendment extends to include negligence. U.S.C.A.Const. Amend. 8.

18. Schools and School Districts ⇐176

Full panoply of procedures associated with judicial process are not required in determining whether school officials may administer corporal punishment. U.S.C.A.Const. Amend. 14.

19. Schools and School Districts ⇐176

If student concedes that he has engaged in certain conduct, but claims that he did not know that such conduct was prohibited, school authorities should proceed with caution in administering corporal punishment.

20. Schools and School Districts ⇐175

Punishment of any sort would be patently unfair where student was generally unaware of school regulation, and had no reason to know that he was engaging in conduct which might later be used as basis for punishment.

21. Schools and School Districts ⇐175

If student claims that he is innocent of conduct which merits punishment, school officials should make sufficient inquiries to ensure that, to contrary, student is guilty beyond any reasonable doubt.

22. Schools and School Districts ⇐175

Where student claims that he is innocent of conduct which merits punishment, student should be allowed to respond to witnesses against him, and in some cases should be accorded opportunity to ask them relevant questions.

23. Schools and School Districts ⇐175

Hearing as to whether student has in fact been guilty of conduct meriting punishment may take place in informal setting and no formal rules of procedure or evidence need be followed.

24. Schools and School Districts ⇐176

School district policy for imposing corporal punishment comported with required procedures.

25. Schools and School Districts ⇐176

Under the evidence, court could not say that mild or moderate corporal punishment was unrelated to achievement of any legitimate educational purpose.

26. Constitutional Law ⇐253(2)
Criminal Law ⇐1213

Record established that corporal punishment meted out at one school of school district violated constitutional prohibition against cruel and unusual punishment and due process. U.S.C.A. Const. Amends. 8, 14.

27. Courts ⇐405(16.16)

In absence of findings as to extent to which corporal punishment is useful or necessary disciplinary measure in county school system, reviewing court would not consider claim by parents that corporal punishment was inflicted notwithstanding their instructions to contrary.

Alfred Feinberg, Miami, Fla., for plaintiffs-appellants.

Frank A. Howard, Jr., Thomas G. Spicer, Leland E. Stansell, Jr., James A. Smith, Miami, Fla., for defendants-appellees.

Before RIVES, WISDOM and MORGAN, Circuit Judges.

RIVES, Senior Circuit Judge:

More than a century ago, a member of the Supreme Court of Indiana made the following observation:

> "The husband can no longer moderately chastise his wife; nor, according to the more recent authorities, the master his servant or apprentice. Even the degrading cruelties of the naval service have been arrested. Why the person of the schoolboy, 'with his shining morning face,' should be less sacred in the eye of the law than that of the apprentice or the sailor, is not easily explained."

Cooper v. McJunkin, 1853 (4 Ind. (Porter) 290 (Stuart, J.). In the present case, we consider constitutional issues related to corporal punishment in the public school system of Dade County, Florida.

Plaintiffs filed on January 7, 1971, a complaint containing three counts. Counts One and Two were individual actions for compensatory and punitive damages brought by two junior high school students under 42 U.S.C. §§ 1981–1988, with jurisdiction claimed under 28 U.S.C. § 1331 and § 1343. The students claimed personal injuries resulting from corporal punishment administered by certain defendants in alleged violation of their constitutional rights. Count Three of the complaint was a class action, also brought under 42 U.S.C. §§ 1981–1988, with jurisdiction claimed under 28 U.S.C. § 1331 and § 1343. This class action filed on behalf of all students in the public school system of Dade County sought injunctive and declaratory relief against the use of corporal punishment throughout the county school system.

The plaintiffs presented their evidence on Count Three of the complaint

in a week long trial before the district court without a jury. Those who testified included sixteen students or former students, several parents and other relatives of students, a professor of educational psychology, and a number of school teachers and administrators, including the defendant Superintendent Edward Whigham. The evidence also included a photograph, stipulations, answers to interrogatories, school records and medical reports. At the close of the plaintiffs' case, the defendants moved for dismissal under Rule 41(b), F.R. Civ.P., which in relevant part provides:

> "After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits."

The district court noted in its order that counsel for the parties then agreed that the evidence offered to support Count Three "would also be considered by the Court, as if upon motion for directed verdict, as having been offered on Counts One and Two, provided that certain additional testimony desired by Plaintiffs' counsel were placed in the record by deposition or stipulation." Thus, this case really involves one equity case, styled Count Three, and two law cases, styled Counts One and Two. The additional testimony was summarized in a stipulation. On February 23, 1973, the district court first dismissed Count Three of the complaint, and then concluded that a jury could not lawfully find that either of the plaintiffs in Counts One and Two sustained a deprivation of constitutional rights.

We hold that the district court erred in dismissing each of the three counts of plaintiffs' complaint, and, therefore, reverse and remand for further proceedings.

I.

JURISDICTIONAL ISSUES

A. Defendants assert that there is no federal jurisdiction over Count Three under 42 U.S.C. §§ 1981–1988 and 28 U.S.C. § 1331 and § 1343, because the Dade County School Board and the Superintendent of Schools in their official capacities are not "persons" amenable to civil rights actions. In support of this claim defendants cite City of Kenosha v. Bruno, 1973, 412 U.S. 507, 93 S.Ct. 2222, 37 L.Ed.2d 109. In *City of Kenosha*, the Supreme Court held that two municipalities in Wisconsin were not "persons" within the meaning of 42 U.S.C. § 1983. In Campbell v. Masur, 5 Cir. 1973, 486 F.2d 554, where a plaintiff sued a school superintendent and a school board in their official capacities only, the court sent the case back to the district court for re-examination and further consideration in light of *City of Kenosha*.[1]

[1] Plaintiffs have sued Superintendent of Schools Edward L. Whigham in his individual capacity, as well as in his official capacity.[2] It is clear that

1. Also see Cheramie v. Tucker, 5 Cir. 1974, 493 F.2d 586, 587, where this Court held that various arms of the state government of Louisiana, such as the Department of Highways, are not persons within the meaning of 42 U.S.C. § 1983.

2. Willie J. Wright, I (a principal), Lemmie Deliford (an assistant principal) and Solomon Barnes (an assistant to a principal) have each also been sued in his official and individual capacity.

the school superintendent, sued as an individual, is a "person" within the meaning of § 1983. Sterzing v. Fort Bend Independent School District, 5 Cir. 1974, 496 F.2d 92, p. 93, n. 2; United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach, 5 Cir. 1974, 493 F.2d 799. To hold otherwise would suggest the impossibility of suing any government official or employee under § 1983. *City of Kenosha, supra*, does not require or even intimate the possibility of such a result. The right to bring a § 1983 action against a state or local official is well established. See Monroe v. Pape, 1961, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492, and its progeny. Also see Moor v. County of Alameda, 1973, 411 U.S. 693, 700, 93 S.Ct. 1785, 36 L.Ed.2d 596.

[2] Prior to the decision in *City of Kenosha*, a number of courts had held that cities were proper defendants under § 1983 where equitable relief was sought. See discussion in City of Kenosha v. Bruno, *supra*, 412 U.S. at 512–514, and at 516ff, 93 S.Ct. 2222 (Douglas, J., dissenting in part). The complaint in the present case, and all of the proceedings in the district court, occurred before *City of Kenosha* was decided. Taking these factors into consideration, the district court should on remand grant the likely request of plaintiffs to add the individual members of the Dade County School Board as parties defendant under Count Three of the complaint. Without regard to whether the plaintiffs may ultimately be entitled to any equitable relief against the School Board or its members, fairness and efficient judicial administration justify the addition of the individual school board members as parties insofar as the plaintiffs seek declaratory and equitable relief restraining the School Board from authorizing or implementing corporal punishment in Dade County. See Rule 21, F.R.Civ.P.; Mullaney v. Anderson, 1952, 342 U.S. 415, 72 S.Ct. 428, 96 L.Ed. 458; United States v. Louisiana, 1957, 354 U.S. 515, 77 S.Ct. 1373, 1 L.Ed.2d 1525; Halladay v. Verschoor, 8 Cir. 1967, 381 F.2d 100; Rakes v. Coleman, E.D.Va.1970, 318 F.Supp. 181; 3A Moore ¶ 31.05[1].

[3–5] B. Although not argued by the parties on this appeal, it is appropriate to examine whether Count Three of the instant case should have been heard by a three-judge district court.[3] Though neither party requested a three-judge district court, consent, either implied or express, cannot authorize a single judge to hear a case that falls within the terms of 28 U.S.C. § 2281. Sands v. Wainwright, 5 Cir. 1973, 491 F.2d 417, 424 (en banc); Borden Co. v. Liddy, 8 Cir. 1962, 309 F.2d 871; Americans United for Sep. of Church & State v. Paire, 1 Cir. 1973, 475 F.2d 462. The district court in the present case considered the question and ruled that a three-judge district court was not required. We agree.

Plaintiffs sought injunctive relief restraining the defendants, their agents and employees from inflicting any form of corporal punishment upon students in the Dade County public school system.[4] Plaintiffs did not request an injunction restraining the enforcement of any specific Florida statute, and in oral argument before this Court, counsel for plaintiffs stated, "We are not challenging the constitutionality of the Florida statute." Section 232.27 of Florida Statutes Annotated, provides:

> "Each teacher or other member of the staff of any school shall assume such authority for the control of the

3. Counts One and Two, which are individual actions for damages, clearly do not require a three-judge district court. Therefore, if it were determined that a three-judge court is necessary to decide Count Three, we would still be obliged to consider most or all of the underlying facts in this case in order to review the district court's disposition of Counts One and Two.

4. Plaintiffs' request for injunctive relief restraining the defendants from administering corporal punishment in Charles R. Drew Junior High School is obviously included within the larger request for injunctive relief throughout the entire county system.

pupils as may be assigned to him by the principal and shall keep good order in the classroom and in other places in which he is assigned to be in charge of pupils, but he shall not inflict corporal punishment before consulting the principal or teacher in charge of the school, and in no case shall such punishment be degrading or unduly severe in its nature."

The injunctive relief sought by plaintiffs would not conflict with this provision, and would not extend beyond Dade County. By establishing limits upon the administration of corporal punishment, the statute inferentially permits local school boards to authorize such punishment. This statute does not mandate or require corporal punishment, however, nor does it compel local school boards to adopt regulations providing for corporal punishment. In fact, the statute would not prevent a local board from prohibiting corporal punishment in certain grade levels or throughout a county system.

The Dade County School Board adopted a policy which affirmatively authorized the use of corporal punishment in Dade County schools. It is the implementation of this policy, and the practices which have developed in Dade County under the authority of this policy, particularly in one junior high school, which the plaintiffs seek to enjoin. Although a regulation authorizing corporal punishment is consistent with F.S. 232.27, F.S.A. an injunction restraining the named defendants, their agents and employees from the use of corporal punishment would not require the invalidation of the Florida statute, and would not directly affect any county in Florida other than Dade County. Count Three, therefore, comes within the rule that where a challenged regulation or policy is of only local import, a single judge must hear the case. Board of Regents of University of Texas System v. New Left Education Project, 1972, 404 U.S. 541, 92 S.Ct. 652, 30 L.Ed.2d 697; Moody v. Flowers, 1967, 387 U.S. 97, 87 S.Ct. 1544, 18 L.Ed.2d 643; Griffin v. School Board of Prince Edward County, 1964, 377 U.S. 218, 327, 328, 84 S.Ct. 1226, 12 L.Ed.2d 256; Rorick v. Board of Commissioners, 1939, 307 U.S. 208, 59 S.Ct. 808, 83 L.Ed. 1242; Ex parte Public National Bank, 1928, 278 U.S. 101, 49 S.Ct. 43, 73 L.Ed. 202; Ex parte Collins, 1928, 277 U.S. 565, 48 S.Ct. 585, 72 L.Ed. 990; Sands v. Wainwright, 5 Cir. 1973, 491 F.2d 417 (en banc).

II.

THE FACTS

As to the district court's findings or treatment of facts, appellate review is governed by one rule applicable to Count Three and by a different rule applicable to Counts One and Two. We have heretofore indicated that there were two separate orders of dismissal. Count Three was dismissed under Rule 41(b), F.R. Civ.P. "on the ground that upon the facts and the law the plaintiff has shown no right to relief." As authorized by that rule, the district court in effect rendered judgment on the merits against the plaintiffs and made findings as provided in Rule 52(a). See Emerson Electric Co. v. Farmer, 5 Cir. 1970, 427 F.2d 1082, 1086; Wright & Miller, Federal Practice & Procedure § 2371; Moore's Federal Practice ¶ 41.13[4]. The district court's order of dismissal as to Counts One and Two correctly recognized that, "The issue now before the Court is whether the evidence, viewed most favorably to plaintiffs is sufficient to permit a jury to return a verdict for plaintiffs on either or both of the First and Second Counts." On that issue, our review of the sufficiency of the evidence is governed by the familiar rule enunciated in Boeing Company v. Shipman, 5 Cir. 1969, 411 F.2d 365, 374-375.

In its order of dismissal as to Count Three, the district court listed its "Findings of Fact" as follows:

"1. The Dade County public school system is the sixth largest in the nation, with approximately 12,500 teachers and administrative personnel operating 237 schools with a total student population in excess of 242,000.

"2. Corporal punishment is one of a variety of measures employed in the school system for the correction of pupil behavior and the preservation of order. Other alternative measures in use range from parent and student conferences, the use of guidance counselors and psychologists, where available, to suspension and expulsion. Corporal punishment is not utilized at all in sixteen schools in Dade County.

"3. Statutory authority for the use of corporal punishment in Florida is found in Florida Statutes, § 232.27, which deals with the duties of teachers in the control of pupils, but provides that a teacher "* * * shall not inflict corporal punishment before consulting the principal or teacher in charge of the school * * *." The Defendant School Board's policy as it existed when this suit was filed is more restrictive. It requires the principal to determine the necessity for corporal punishment, and to designate the time, place and person to administer the punishment, and in other ways limits the circumstances in which the punishment may be used. The policy was revised in November, 1971, and supplemented with detailed regulations, which prescribe additional limitations upon the nature, extent and circumstances of permissible punishment.

"4. There is no published schedule of infractions for which corporal punishment is authorized, nor any formal procedural requirements which must be observed before punishment may be administered.

"5. There has been a rather widespread failure to adhere to School Board policy regarding corporal punishment. Teachers have punished students without first consulting with their respective principals. More blows have been administered to students than authorized by the policy. Teachers have administered corporal punishment with only the student or students present. With the exception of a few cases, the punishments administered have been unremarkable in physical severity.

"The instances of punishment which could be characterized as severe, accepting the students' testimony as credible, took place in one junior high school."

We agree with and accept the expressed findings of the district court. However, those findings are somewhat meager considering the voluminous evidence presented in this case, and it is therefore appropriate for us to detail more fully what the testimony and other evidence reveals.

Dade County School Board Policy 5144 expressly authorizes the use of corporal punishment, and prescribes the procedures to be followed where a teacher feels that corporal punishment is necessary.[5] During the 1970-71 school

5. During the 1970-71 school year, Policy 5144 provided in relevant part as follows:
"II. Punishment: Corporal Punishment
"Punishment in the general sense is the inflicting of a penalty for an offense. Corporal punishment is generally applied to the body of the offender or is physical punishment as opposed to other forms of punishment and is administered as a means of changing the behavior of the student. Therefore, it is important to analyze whether or not this goal will be accomplished by such action.
"Corporal punishment may be used in the case where other means of seeking cooperation from the student have failed. If it appears that corporal punishment is likely to become necessary, the teacher must confer with the principal. The principal will determine the necessity for corporal punishment and designate the time, place, and the person to administer said punishment. In any case, the student should understand clearly the seriousness of the offense and the reason for the punishment. Care should be taken that the period of time between the offense and the punishment is not so long as to cause undue anxiety in the pupil. The punishment must be administered in kindness and in the presence of another adult at a time and under conditions not calculated

year, Policy 5144 provided, among other things, that the punishment be administered "in kindness and in the presence of another adult" and that "no instrument shall be used that will produce physical injury to the student, and no part of the body above the waist or below the knees may be struck."

The evidence shows that corporal punishment in Dade County during the relevant period consisted primarily, if not entirely, of "paddling." [6] Paddling involves striking the student with a flat wooden instrument [7] usually on the buttocks. The district court recognized that the evidence revealed "a rather widespread failure to adhere to School Board policy regarding corporal punishment." Many of the student witnesses gave testimony which indicated that their teachers in various schools did not always consult with the principal of the school before administering corporal punishment. A number of non-principals admitted in their answers to interrogations that they did not "regularly and routinely" confer with the principal before paddling students.[8] Student testimony also indicated, and the district court found, that teachers sometimes administered corporal punishment with only the student or students present, whereas school board policy required the presence of another adult during the administration of corporal punishment.

In at least 16 of the 231 Dade County schools, corporal punishment was not utilized in the 1970–71 school year.[9] The evidence suggests that in most of those schools which did use corporal punishment, the punishment was normally limited to one or two licks, or sometimes as many as five, with no apparent physical injury to the children who were punished. Quoting from the district court's findings of fact, "The instances of punishment which could be characterized as severe * * * took place in one junior high school." This school was Charles R. Drew Junior High School, and the occurrences there merit description.

The experiences of individual students at Drew reveal the nature of the system of corporal punishment utilized at this educational institution. On October 6, 1970, a number of students, including

to hold the student up to ridicule or shame.

"In the administering of corporal punishment, no instrument shall be used that will produce physical injury to the student, and no part of the body above the waist or below the knees may be struck. The person administering the corporal punishment must realize his own personal liabilities if the student being given corporal punishment is physically injured.

"Corporal punishment should never be administered to a student whom school personnel know to be under psychological or medical treatment unless there has been a pre-conference with the school psychologist or the physician."

On November 3, 1971, almost ten months after this action was filed, Policy 5144 was extensively revised. As indicated by the district court, this revision included "detailed regulations, which prescribe additional limitations upon the nature, extent and circumstances of permissible punishment."

6. We recognize that the term "paddling" is a word of art. Plaintiffs in their brief refer to "beating." Similarly, the punishment is described in terms of "licks" and "blows," and the instruments of punishment are referred to as "paddles" and "boards."

7. Paddle size was not prescribed during 1970–71. Most paddles probably were within the range indicated by the November 3, 1971 revision of Policy 5144: "The instrument must be of wood and be no more than two feet long nor more than one-half inch thick and no more than four inches wide."

8. By stipulation dated October 10, 1971, the parties agreed that, "The total number of persons with the Dade County School System, other than school principals, who administered corporal punishment but did not regularly and routinely confer with the principal of the school in which they were employed during the school year commencing September 1970 was 59 (fifty-nine) prior to each paddling." (R. 1435) This stipulation was based on questionnaires prepared by the plaintiffs and completed by school officials and employees.

9. At least 10 of these schools did not administer corporal punishment as a matter of school policy. See stipulation of October 10, 1972. Also see district court finding 2.

fourteen-year-old James Ingraham, a named plaintiff, were slow in leaving the stage of the school auditorium when asked to do so by a teacher. A number of boys and girls involved in this incident were taken to the principal's office and paddled. James protested, claiming he was innocent, and refused to be paddled. Willie J. Wright, I, the principal called for the assistance of Lemmie Deliford, the assistant principal in charge of administration, and Solomon Barnes, an assistant to the principal. Barnes and Deliford held James by his arms and legs and placed him, struggling, face down across a table. Wright administered at least twenty licks.[10] After the paddling, Wright told James to wait outside his office—"he said if I move he was going to bust me on the side of my head"—(Tr. 144), but James went home anyway.

At home, James examined his injuries; according to him, his backside was "black and purple and it was tight and hot." (Tr. 146) James' mother took him to a local hospital. The examining doctor diagnosed the cause of James' pain to be a "hematoma." "The area of pain was tender and large in size, and * * * the temperature of the skin area of the hematoma was above normal which is a sign of inflammation often associated with hematoma." [11] The doctor prescribed pain pills, a laxative, sleeping pills and ice packs, and advised James to stay at home for at least a week (Tr. 148). A different doctor examined James on October 9, when he returned to the hospital for treatment, and on October 14. This doctor described James' injury as follows: "The patient's subjective [sic] signs of injury included a hematoma approximately six inches in diameter which was swollen, tender and purplish in color. Additionally, there was serousness or fluid oozing from the hematoma." [12] On October 14, eight days after the paddling, this doctor indicated that James should rest at home "for next 72 hours." [13] James testified that it was painful even to lie on his back in the days following the paddling, and that he could not sit comfortably for about three weeks (Tr. 149).

Roosevelt Andrews, the other named plaintiff, testified that he was paddled about ten times in one year at Drew (Tr. 273). He was paddled a number of times by his physical education teachers for being late or for not "dressing out." [14]

On one occasion, a teacher stopped Roosevelt, told him he could not possibly get to his next class in time and then took him to Barnes. Barnes told Roosevelt to go into a bathroom with a number of other boys. Barnes allegedly lined about 15 boys up against the urinals and paddled them. According to Roosevelt, the blows must have hurt, because some of the boys were "hollering, cry, prayed, and everything else" [sic] (Tr. 294). After the other boys left, Roosevelt told Barnes that he would have made it to class if the teacher had

10. The district court found that James Ingraham "received 20 licks with a wooden paddle, which produced a painful and serious hematoma on his buttocks." (R. 1561)

11. Stipulated testimony of Dr. Fernando Milanes (R. 1557).

12. Stipulated testimony of Dr. Carlos Gamez (R. 1558).

13. Exhibit 8, in form of prescription signed by Dr. Gamez.

14. "Dressing out" refers to putting on the proper uniform for physical education class. According to Roosevelt, he was once paddled for not having white socks. His teacher refused to listen to his explanation that his socks had been stolen. On another occasion, Roosevelt was paddled for not having tennis shoes, although he tried to explain to the teacher that someone had stolen his shoes and that he could not get new ones because his family could not afford them.

Another student, Reginald Bloom, testified that he was paddled for not having gym shorts, although his shorts had been stolen. Other students at Drew and other schools also testified to paddlings in physical education class, for such offenses as not dressing out, lateness, talking at inappropriate times, and other minor misconduct. These paddlings normally consisted of one or two or sometimes three licks.

not stopped him. Barnes told Roosevelt to bend over. Roosevelt refused. Then, according to Roosevelt, Barnes

"pushed me against the urinate thing, the bowl, and then he snatched me around to it and that's when he hit me first. He first hit me on the backsides and then I stand up and he pushed me against the bathroom wall, them things—that part the bathroom, the wall * * * Between the toilets, he pushed me against that and then he snatched me from the back there and that's when he hit me on my leg, then hit me on my arm, my back and then right across my neck, in the back here."

(Tr. 295.) Incensed over his treatment, Roosevelt complained to Wright, but Wright seemed to support Barnes, his co-administrator.

At a later time, Wright paddled Roosevelt, apparently for the breakage of some glasses in sheet metal class, although Roosevelt claimed it was not his fault. Roosevelt testified that during this paddling, his wrist was hit, and that painful swelling occurred. Roosevelt went to see a doctor about his wrist. The doctor gave him pain pills and advised him to keep something cold on his wrist.[15] For about a week his wrist hurt, and he could not use his arm.

Donald Thomas testified that Barnes carried a paddle with him when he walked around the school and that Deliford carried brass knuckles.[16] Donald further testified to a scheme of punishment used in the auditorium. The seats were numbered and each student had an assigned seat. If a student misbehaved, his number was put on the board. Then Barnes would come into the auditorium and paddle the students whose numbers were listed, without asking who had done what. About five to eight students were paddled every day, generally receiving four or five licks or so each. Donald claimed he was paddled under these circumstances between 5 and 10 times. Another student, Nicky Williams, who was paddled under this system, complained that Barnes would not listen to any explanations.

Daniel Lee, who was paddled "lots of times" (Tr. 463) at Drew, described how on one occasion Barnes had a number of students "in a line, holding onto the chair, already paddling them,"[17] and asked him to come over and "get a little piece of the board." (Tr. 480–481.) Daniel asked what he had done, and Barnes allegedly grabbed him and tried to throw him on the chair. In the ensuing confusion, Barnes hit Daniel on the hand four or five times.[18] The hand

15. Roosevelt's mother, Mrs. Willie Everett, supported Roosevelt's description of his wrist injury.

16. James Ingraham, Roosevelt Andrews, Daniel Lee, Reginald Bloom, Ray Jones and Nicky Williams also testified that Barnes carried a paddle with him around the school. Mrs. Everett, Alphonse Hicks and Larry Jones saw Barnes at school with brass knuckles. Reginald Bloom claimed he saw Deliford with brass knuckles. The apparent visibility of the paddle and of the brass knuckles may have affected the atmosphere at Drew.

17. As described by Daniel Lee and other witnesses, a student about to be paddled at Drew was sometimes required to bend over the back of a chair with his hands on the front of the seat of the chair. A number of witnesses testified that if the student let the chair go, or in some other fashion failed to take the punishment as prescribed, extra licks were given. Daniel Lee testified that on one occasion, Deliford told a group he was punishing that, "If you let go, if you let the chair go, every time you let the chair go, that's fifteen more licks. If you count to three and you don't be back down on the chair, that's fifteen more licks." (Tr. 479; see also 477.)

18. On cross-examination, the following exchange occurred:
"Q. Are you telling the Court that Mr. Barnes hauled off and deliberately hit you on the hand?
"A. Yes, sir; because he tried to throw me against the chair, you know, and I wouldn't get over there and so he grabbed me and hit me on the hand with the board.
"Q. He was trying to hit you on the rear end, wasn't he?
"A. No.
"Q. Are you saying he deliberately hit you on the hand?
"A. Yes, sir.
"Q. That has made your hand swell up?
"A. Yes, sir." (Tr. 487–488.)

swelled and hurt "and the bone was—it seems like the bone was going to come out" (Tr. 481), so Daniel's mother took him to the hospital for an X-ray. According to Daniel, a bone in his right hand was fractured. The Court, observing Daniel's hand, stated that "It seems to me to be disfigured, a portion of his right knuckle is enlarged to some degree." Daniel claimed that his hand still hurt, and swelled if he tried to use it.

Reginald Bloom testified that he was paddled at Drew about 15 times. One time Deliford paddled Reginald about fifty licks for allegedly making an obscene phone call to a teacher. Reginald claimed at the time that he had not made the call, and later another boy confessed to making it. Reginald testified on cross-examination that Deliford seemed to be hitting him as hard as he could, and that after the paddling was over, he had to go home because he couldn't sit down. A doctor examined Reginald's buttocks and prescribed ice packs. Reginald found it painful to sit down for about three weeks. Reginald's mother testified that her son's buttocks were "black and blue right across," swollen, and sore. She testified further that she applied ice packs to his buttocks for about three days or more after he was paddled. Another time Reginald and some other boys were called into the principal's office and accused of fighting on the way home from school. When the boys refused to be paddled, Deliford, Barnes and Wright allegedly manhandled one of the boys:

"Mr. Deliford grabbed him and Mr. Barnes and Mr. Deliford started jumping on him, throwing him around the room in the office.

"Then Mr. Wright, he got with Mr. Deliford and Mr. Barnes and started throwing the boy around the room, hitting him, throwing him on the table."

(Tr. 517.) The boy cried out that the men had broken his hand and two weeks later came back to school with a bandage on his hand. Reginald also testified that Barnes paddled boys for chewing gum and for not tucking in their shirttails.

Ray A. Jones and a boy named Carson were brought to the office at Drew by a policeman for "playing hooky." Deliford and Barnes gave each boy about fifty licks, causing both boys to cry. Two girls were present during this punishment and after the boys were paddled, the girls received about five licks each. Ray testified that he was unable to sit comfortably for about two weeks. Ray's grandmother stated that when she looked at Ray's buttocks, she saw "big swollen places."

Rodney Williams testified that because he wanted to wipe some foreign matter off his seat in the auditorium before sitting down, his number was put on the board and Barnes later took him to his office. Because he thought he was innocent, Rodney refused to "hook up."[19] Rodney testified that Barnes then hit him five or ten times on his head and back with a paddle, and then hit him with a belt. The side of Rodney's head swelled, and an operation proved necessary to remove a lump of some sort which had developed where Rodney had been struck. Rodney was out of school for about a week, and felt that the operation affected his memory and thinking. Another time, after Deliford had given him ten licks, Rodney's chest hurt and he threw up "blood and everything" (Tr. 601). Perhaps because he had asthma and heart trouble of some sort, Rodney also reacted to this paddling by "shaking all over" and "trembling," and required treatment at a local hospital. On a later occasion, a paddling

19. To assume a position standing in back of a chair, with hands on the seat of the chair, in preparation to being paddled.

by Wright again caused Rodney to cough up blood (Tr. 604).

Larry Jones testified that physical education teachers at Drew paddled him about ten times and that Deliford paddled him a "heap of times"—about ten. Several times Larry received ten licks. On one occasion, when Larry refused to be paddled, "he [Deliford, or perhaps Barnes] had to start hitting me with that stick, and he put two knots on my head" (Tr. 651).

Janice Dean testified that, on her first day at Drew, she did not know about assigned seats in the auditorium and sat in the wrong place. As a result, Deliford gave her five licks. Another time, when Janice was sent to the office, Barnes administered fifteen licks, apparently without knowledge of the alleged misconduct, on a theory he allegedly explained as follows: "He said he knew we had done something wrong or we wouldn't have been there." (Tr. 819).

Preston Sharpe testified that during four years at Drew, Deliford paddled him about ten times. One time Preston was paddled for having his shirttail hanging out. Another time, when he was supposed to receive ten licks, Preston received five extra licks for not reassuming a paddling position quickly enough after one of the licks, and three extra licks for allowing the chair to move and hit a door.

Nathaniel Evans testified that during one year at Drew, he was paddled four times. On one occasion, when the typing class was noisy, Barnes gave each of the fifteen students five licks. Another time, when Barnes was trying to find out who had been whistling, he took a class of 30-50 students and methodically began to paddle each student in an attempt to locate the one who had been whistling. After about half of the class had been paddled, some students told Barnes who had whistled, and the rest of the class was spared. Nathaniel received ten licks on another occasion when his name, along with six others, was written on the board in the auditorium.

III.

CRUEL AND UNUSUAL PUNISHMENT

[6] The Eighth Amendment prohibits the infliction of "cruel and unusual punishment." It is applicable to the states through the due process clause of the Fourteenth Amendment. Robinson v. California, 1962, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758; Furman v. Georgia, 1973, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346.

[7-9] A number of federal courts have held that corporal punishment of school children is not *per se* a violation of the constitutional prohibition against cruel and unusual punishment. Ware v. Estes, N.D.Tex.1971, 328 F.Supp. 657, aff'd per curiam 5 Cir. 1972, 458 F.2d 1360; Whatley v. Pike County Board of Education, N.D.Ga.1971, C.A. 977 (three-judge district court); Glaser v. Marietta, W.D.Pa.1972, 351 F.Supp. 555; Sims v. Board of Education of Independent School Dist. No. 22, D.N.M. 1971, 329 F.Supp. 678.[20] We agree that

20. In Gonyaw v. Gray, D.Vt.1973, 361 F.Supp. 368, 368, as one ground for dismissal of an action brought by parents of students subjected to corporal punishment, the court stated that, "This statute does not offend the protection against cruel and unusual punishment secured by the Eighth Amendment, since this amendment provides a limitation against penalties imposed for criminal behavior. * * * * Since neither plaintiff was punished for an offense which was criminal in nature, the Eighth Amendment does not proscribe the conduct assigned to the defendants." (Citations omitted.)

We find this approach unpersuasive. It was succinctly stated in Vol. 6 Harv.Civ. Rights—Civ.Lib.L.Rev., Corporal Punishment in the Public Schools, p. 585 n. 24:

"In Trop v. Dulles, 356 U.S. 86, 94-100 [78 S.Ct. 590, 2 L.Ed.2d 630] (1958), the Supreme Court, in applying the eighth amendment to all punishments inflicted pursuant to 'penal laws,' set forth two tests to determine the meaning of penal. First, there must be the imposition of a 'disability for the purpose of punishment.' *Id.* at 96 [78 S.Ct. 590]. Second, there must be the prescription of a 'consequence

at the present time corporal punishment *per se* cannot be ruled violative of the Eighth Amendment. Mild or moderate use of corporal punishment as a disciplinary measure in an elementary or secondary school normally will involve only transitory pain of a non-intense nature and will not cause intense or sustained suffering or permanent injury. For this reason, although many might object to corporal punishment for a variety of reasons, such punishment *per se* cannot presently be held to be "excessive" in a constitutional sense,[21] or so "degrading" to the "dignity" of school children as to violate the Eighth Amendment.[22] Although the scope of the Eighth Amendment admittedly is not "static" and must draw its meaning from "evolving standards of decency," Trop v. Dulles, 1958, 356 U.S. 86, 101, 78 S.Ct. 590, 2 L.Ed.2d 630, it is significant that a large number of states continue to authorize the use of moderate corporal punishment,[23] and that corporal punishment apparently is still utilized in many school systems. Faced with this evidence of what is apparently considered appropriate by the American people, we would be loath to suggest that at this time corporal punishment is "unacceptable to contemporary society," Furman v.

that will befall one who fails to abide by regulatory provisions . . . .' *Id.* at 97 [78 S.Ct. 590].

"Infliction of corporal punishment by public school personnel meets both tests." Corporal punishment of schoolchildren is "punishment" in every sense of the word, whether it is called "criminal" or "civil." Cf. In re Gault, 1967, 387 U.S. 1, 17, 87 S.Ct. 1428, 18 L.Ed.2d 527. Corporal punishment is used by state officials to punish students for misbehavior committed during attendance at school, and resembles statutorily prescribed punishments for crimes in its purposes and effects. Some of the offenses punished by corporal punishment are in fact essentially criminal in nature, such as assaults or destruction of property. No doubt for these reasons, most courts which have considered the constitutionality of corporal punishment have assumed that such punishment may be evaluated under eighth amendment standards. See especially Nelson v. Heyne, 7 Cir. 1974, 491 F.2d 352, and Bramlet v. Wilson, 8 Cir. 1974, 495 F.2d 714. In *Bramlet* the court said, "an excessive amount of physical punishment [in a public school setting] could be held to be cruel and unusual and therefore prohibited." The court also stated, "the designation of conduct as other than 'punishment' is simply a label of convenience and will not obviate an eighth amendment inquiry. Knecht v. Gillman, 488 F.2d 1136 (8th Cir. 1973)."

In Jackson v. Bishop, 8 Cir. 1968, 404 F.2d 571, and Wright v. McMann, 2 Cir. 1967, 387 F.2d 519, courts found impermissible cruelty in offensive "punishments" devised by prison officials, and at least some members of the Supreme Court have acknowledged the propriety of these findings. See Furman v. Georgia, 1972, 408 U.S. 238, 384, 92 S.Ct. 2726, 33 L.Ed.2d 346 (Chief Justice Burger dissenting, joined by Justices Blackmun, Powell and Rehnquist). We think punishments devised by school officials are similarly subject to Eighth Amendment scrutiny. Paraphrasing the opinion in In re Gault, *supra*, 387 U.S. at 47, 87 S.Ct. 1428, it would indeed be surprising if the Eighth Amendment protected hardened criminals but not school children.

21. O'Neil v. Vermont, 1892, 144 U.S. 323, 339, 12 S.Ct. 693, 36 L.Ed. 450 (Field, J., dissenting); Furman v. Georgia, *supra*, 408 U.S. at 279-280, 92 S.Ct. 2726 (Brennan, Jr., concurring).

22. Furman v. Georgia, *supra*, 408 U.S. 271-273, 92 S.Ct. 2726 (Brennan, Jr., concurring); Trop v. Dulles, 1958, 356 U.S. 86, 100, 78 S.Ct. 590, 2 L.Ed.2d 630.

23. According to a Report of the Task Force on Corporal Punishment published in 1972 by the National Education Association, at p. 26, submitted by the plaintiffs, corporal punishment is banned by state law in New Jersey and Massachusetts, and by state school board policy in Maryland. It is also banned, according to this report, in a number of large cities. However, at p. 24 of the report, it is stated that 13 states specifically permit corporal punishment, while in other states the teacher is given the same authority as the parent to discipline the child, or is simply authorized to maintain order and discipline in the classroom. Although the situation may have changed somewhat since 1972, apparently corporal punishment of school children is still allowed in a large number of jurisdictions. This contrasts with the circumstances in Jackson v. Bishop, 8 Cir. 1968, 404 F.2d 571. In that case, where the court held that the use of the strap in the Arkansas prisons violated the Eighth Amendment, the court took into consideration the fact that only two states still permitted the use of the strap. See 404 F.2d at 580.

Georgia, *supra*, 408 U.S. at 277-279, 92 S.Ct. 2726 (Brennan, J., concurring), or that it is "abhored" by popular sentiment, Furman v. Georgia, *supra*, 408 U.S. at 332, 92 S.Ct. 2726 (Marshall, J., concurring).[24]

[10] Examining the specific policies on corporal punishment promulgated by the Dade County School Board, we find in them no violation of the Eighth Amendment. These policies do nothing more than authorize the mild or moderate use of such punishment. Policy 5144, revised effective August 5, 1970,[25] provides that the punishment must be administered "in kindness." "[N]o instrument shall be used that will produce physical injury to the student, and no part of the body above the waist or below the knees may be struck." Further, corporal punishment "should never be administered to a student whom shcool personnel know to be under psychological or medical treatment unless there has been a pre-conference with the school psychologist or the physician."

Policy 5144 was revised extensively effective November 3, 1971. This revision imposes specific limits on the number of strokes—a maximum of five strokes for elementary school children and a maximum of seven strokes for junior and senior high school children. It requires the use of an instrument "calculated to eliminate possible physical injury." The punishment must be administered "posteriorly," and "under no circumstances shall a student be struck about the head or shoulders." The former provision as to students under psychological or medical treatment is retained. Emphasis upon consideration of the "nature of the misconduct" and the "seriousness of the offense," and the requirement of recording the "infraction of rules which caused the punishment," make it clear that the punishment is not to be inflicted arbitrarily or without cause. This revision is not obnoxious to the Eighth Amendment; it represents an effort to insure through specific guidelines that corporal punishment in Dade County will not go beyond "the moderate use of physical force or physical contact, as may be necessary to maintain discipline and to enforce school order and rules."

Although Policy 5144 does not on its face conflict with the Eighth Amendment, it is necessary to inquire further and to determine whether corporal punishment as applied in the Dade County schools offends Eighth Amendment standards. In fact, we deem it more important to know how corporal punishment is actually administered than to know the relevant rules or regulations.[26]

24. The dissenters in Furman v. Georgia emphasized the fact that "Capital punishment is authorized by statute in 40 States, the District of Columbia, and in the federal courts for the commission of certain crimes" (408 U.S. at 385, 92 S.Ct. at 2801), and that juries acting as "'the conscience of the community'" (408 U.S. at 388, 92 S.Ct. 2726), continued to impose capital punishment. See 408 U.S. at 383-391, 92 S.Ct. 2726 (Burger, C. J., dissenting). Justice Brennan suggests, however, that "The acceptability of a severe punishment is measured, not by its availability, for it might become so offensive to society as never to be inflicted, but by its use." 408 U.S. at 279, 92 S.Ct. at 2747. The evidence showed that capital punishment had actually been imposed only rarely in recent years. See 408 U.S. at 291 n. 40, 92 S.Ct. 2726. The plaintiffs do not suggest that corporal punishment has become so offensive that it is no longer in general use in many States.

25. Policy 5144 was revised again on December 9, 1970, but there were no substantive changes in those parts of the policy dealing with corporal punishment.

26. The opinion of Judge (now Justice) Blackmun in Jackson v. Bishop, 8 Cir. 1968, 404 F.2d 571, 579, 580, finds that corporal punishment in prisons is difficult to adequately control by rules or regulations:

"We are not convinced that any rule or regulation as to the use of the strap, however seriously or sincerely conceived and drawn, will successfully prevent abuse. * * * Rules in this area seem often to go unobserved. * * * Regulations are easily circumvented. * * * Corporal punishment is easily subject to abuse in the hands of the sadistic and the unscrupulous. * * * Where power to punish is granted to persons in lower levels of administrative authority, there is an inherent and natural difficulty in enforcing the limitations of that power. * * * There can be no argument that excessive whipping or an inappropriate manner of whipping or too great frequency of whipping or the use of studded or overlong straps all constitute cruel and unusual punishment. But if whipping were to be authorized, how does one, or any court, ascertain the point which would distinguish the permissible from that which is cruel and unusual?"

"* * * we have no difficulty in reaching the conclusion that the use of the strap in the penitentiaries of Arkansas is punishment which, in this last third of the 20th century, runs afoul of the Eighth Amendment; that the strap's use, irrespective of any precautionary conditions which may be imposed, offends contemporary concepts of decency and human dignity and precepts of civilization which we profess to possess * * *."

The problems of control suggested in *Jackson* must also exist to some extent in schools, although perhaps to a lesser degree. It is for this reason that we are especially concerned with the actual administration of corporal punishment in the Dade County schools. If we found that adequate controls did not exist, or could not be established, we would be forced to consider adopting the remedy used in *Jackson*, namely, an injunction against any use of corporal punishment. That result must ensue if the controls prove inadequate. It has been cogently argued that a total ban on this punishment is the only effective control:

"While theoretically corporal punishment need not be brutal, there is no assurance that it will be inflicted moderately or responsibly. In the heat of anger, especially if provoked by personal abuse, some teachers are likely to exceed legal bounds. Moreover, if limited corporal punishment were permitted, controls would be unlikely to prevent the 'really unmistakable kind of satisfaction which some teachers feel in applying the rattan.'[29] A total ban of this punishment would provide far more effective control.[30]

"29. J. Kozol, Death at an Early Age 16-17 (1967).

"30. A rule forbidding all corporal punishment would probably receive more compliance than the common law principles because all parties involved are more likely to be aware of it and conscious of any violation. This would likely be reinforced by the added case of convicting a violator, simply by holding the school official involved in contempt of a court order, where injunctive relief is obtained."

6 Harv.Civ.Rights—Civ.Lib.L.Rev., Corporal Punishment in the Public Schools, p. 585.

[11] From the evidence presented, we cannot say that the actual practice of corporal punishment in the Dade County school system as a whole violates the Eighth Amendment. However, we conclude that the plaintiffs' evidence as to the pattern, practice and usage of corporal punishment at Drew Junior High School was such that the trial court erred in dismissing Count Three under Rule 41(b), F.R.Civ.P., and also erred in dismissing Counts One and Two.

It is unclear whether the district court directly considered whether the pattern of punishment at Drew is violative of the Eighth Amendment. The district court found that "The instances of punishment which could be characterized as severe, accepting the students' testimony as credible, took place in one junior high school." There is no doubt that this is a reference to Drew. In its conclusions of law, the district court declared that "Considering the system as a whole, there is no showing * * * [of a violation of the Eighth Amendment]." At another point, the district court stated that "The evidence has not shown that corporal punishment in concept, or as authorized by the School Board, or as applied throughout the system, is arbitrary, capricious, unreasonable or wholly unrelated to the legitimate state purpose of determining its educational policy." Apparently the district court felt that a constitutional violation could be shown only by evidence sufficient to prove employment of cruel and unusual punishment throughout the entire Dade County school system.

[12] We think that such an approach would be incorrect. In our view, a violation of the Eighth Amendment can occur at the level of a single educational institution. The record in this case demonstrates that individual schools in Dade County have great independence in the development of a policy or system as to corporal punishment.[27] This makes it appropriate to examine whether the au-

27. This is reflected by the system developed at Drew, as well as by the fact that at least sixteen schools have discontinued the use of corporal punishment.

thorities at Drew imposed a system of punishment violative of the Eighth Amendment.[28]

From the evidence presented, it appears that Wright, the principal; Deliford, the assistant principal; and Barnes, an assistant to the principal, all agreed either explicitly or implicitly to impose a harsh regime upon the students at Drew. This is dramatically illustrated by their cooperation in administering corporal punishment to James Ingraham. It is further demonstrated by other instances where two or all three administrators were present during paddlings, or were aware of paddlings after they occurred.[29] Considering the evidence as a whole, it would be incredible to find that any one of these three individuals was unaware of the punishment policy pursued by the other two. Thus, the regime at Drew Junior High School was in fact a system of punishment established and imposed by those in authority.

[13] The injuries sustained by various students at Drew demonstrate that the punishment meted out at this school was often severe, and of a nature likely to cause serious physical and psychological damage.[30] The evidence of paddlings for relatively minor offenses, sometimes without any opportunity for the student to explain what happened, show that the punishment was sometimes arbitrary. The frequency of the use of corporal punishment suggests real oppressiveness.

[14] Whether punishment is cruel and unusual in a constitutional sense depends to a significant degree upon the circumstances surrounding the particular punishment. O'Neil v. Vermont, 1892, 144 U.S. 323, 337, 12 S.Ct. 693, 36 L.Ed. 450 (Field, J., dissenting); Robinson v. California, *supra*; Furman v. Georgia, *supra*.[31]

In the present case, children aged twelve through fifteen were punished

28. Eighth Amendment cases in analogous situations support this approach. In Nelson v. Heyne, 7 Cir. 1974, 491 F.2d 352, the Seventh Circuit concluded that the district court did not err in deciding that disciplinary beatings at the Indiana Boys School constituted cruel and unusual punishment. This school had a population of about 400 juveniles. In Wright v. McMann, 2 Cir. 1967, 387 F.2d 519, the Second Circuit held that the allegations that the punishments imposed at a particular New York State prison violated the Eighth Amendment should not have been dismissed.

29. For example, after Roosevelt Andrews was paddled by Barnes in a bathroom, he complained to Wright while Deliford was also present, and his father later complained to Barnes, Deliford and Wright. On a later occasion, Wright paddled Andrews and allegedly hit him on the wrist while Deliford and Barnes were present. Reginald Bloom testified that Deliford, Wright and Barnes manhandled and struck a boy suspected of fighting. Ray Jones testified that Deliford and Barnes were both present when he and another student received fifty licks each, and that the two administrators took turns giving the licks. Larry Jones testified that Deliford and Barnes were both present when he received "two knots on my head."

30. The district court stated in the order of dismissal that, "After having heard the testimony in this case, this Court believes that corporal punishment may be administered in such a way that the resultant psychological harm to some students will be substantial and lasting."

31. In O'Neil v. Vermont, Justice Field in dissent opined that while the Eighth Amendment was usually applied to punishments which inflicted torture, and which were attended with acute pain and suffering, it had a wider applicability:

> "The inhibition is directed, not only against punishments of the character mentioned, but against all punishments which by their excessive length or severity are greatly disproportioned to the offences charged. The whole inhibition is against that which is excessive * * *." 144 U.S. 339-340, 12 S.Ct. 699.

Justice Marshall in Furman v. Georgia, 408 U.S. at 324-327, 92 S.Ct. 2726, argues persuasively that Justice Field's approach was adopted by the Court in later cases, including Howard v. Fleming, 1903, 191 U.S. 126, 24 S.Ct. 49, 48 L.Ed. 121; Weems v. United States, 1910, 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793; Louisiana ex rel. Francis v. Resweber, 1947, 329 U.S. 459, 67 S.Ct. 374, 91 L.Ed. 422, and Trop v. Dulles, 1958, 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed.2d 630. In Robinson v. California, 1962, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758, the Court held that a statute which made addiction to narcotics a misdemeanor inflicted a cruel and unusual punishment. The Court stated that the penalty provided by the statute—ninety days—was not, in the abstract, cruel and unusual. However, the Court classified narcotics addiction as an illness, and noted that, "Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." 370 U.S. 667, 82 S.Ct. 1421.

for alleged misconduct at school. In most instances, this misconduct did not involve physical harm to any other individual or damage to property. Some students claim they never engaged in misconduct at all, but were not given an adequate opportunity to show their innocence or were ignored when they attempted to explain why they did not deserve punishment.

The system of punishment utilized at Drew resulted in a number of relatively serious injuries, and thus clearly involved a significant risk of physical damage to the child. Corporal punishment also creates a risk of psychological damage. Dr. Scott Kester, an assistant professor of educational psychology at the University of Miami, testified that corporal punishment could damage a child's development by engendering anxiety, frustration, and hostility, or by causing sheer pathological withdrawal or hatred of the school environment. He further commented that since children model their behavior after adults, a child who is corporally punished may learn from this that physical force is an appropriate way in which to handle conflicts. Dr. Kester emphasized that the child who is corporally punished often becomes more aggressive and more hostile than he was prior to his punishment.

The evidence shows that corporal punishment is only one of a variety of measures available to school officials to punish students and to correct behavior. As found by the district court, "alternative measures in use range from parent and student conferences, the use of guidance counselors and psychologists, where available, to suspension and expulsion."[32]

Taking into consideration the age of the individuals, the nature of misconduct involved, the risk of physical and psychological damage, and the availability of alternative disciplinary measures, we conclude that the system of punishment at Drew was "excessive" in a constitutional sense. The severity of the paddlings and the system of paddling at Drew, generally, violated the Eighth Amendment requirement that punishment not be greatly disproportionate to the offenses charged. Our review of the evidence has further convinced us that the punishment administered at Drew was degrading to the children at that institution.

[15] Our result is not inconsistent with Ware v. Estes, *supra*, and other cases involving corporal punishment of children. In the *Ware* case, there was evidence of abuse by some of the teachers in the Dallas school district, but there is no indication that the system of

32. In 1972, a Task Force of the National Education Association suggested a number of alternatives to the use of corporal punishment and proposed a "Model Law Outlawing Corporal Punishment":

> "Corporal Punishment of Pupils
>
> "No person employed or engaged by any educational system within this state, whether public or private, shall inflict or cause to be inflicted corporal punishment or bodily pain upon a pupil attending any school or institution within such education system; provided, however, that any such person may, within the scope of his employment, use and apply such amounts of physical restraint as may be reasonable and necessary:
>
> "1) to protect himself, the pupil or others from physical injury;
>
> "2) to obtain possession of a weapon or other dangerous object upon the person or within the control of a pupil;
>
> "3) to protect property from serious harm; and such physical restraint shall not be construed to constitute corporal punishment or bodily pain within the meaning and intendment of this section. Every resolution, bylaw, rule, ordinance, or other act or authority permitting or authorizing corporal punishment or bodily pain to be inflicted upon a pupil attending a school or educational institution shall be void."

See Report of The Task Force on Corporal Punishment, National Education Association, p. 29-A.

punishment in the school system as a whole, or in any particular school, approached the severity and arbitrariness of the system developed at Drew. Also, the court in *Ware* noted that in one case where a student was severely injured, the assistant principal responsible for the injury was suspended from his duties for several months. There is no indication from the record in this case that any efforts were made in the relevant time period to control or to moderate the system of punishment established by Wright, Deliford and Barnes.[33]

In Nelson v. Heyne, 7 Cir. 1974, 491 F.2d 352, 354 n. 4, the Seventh Circuit states that, "The law appears to be well settled in both state and federal jurisdictions that school officials do not violate 8th Amendment proscriptions against cruel and unusual punishment *where the punishment is reasonable and moderate.*" (Emphasis added.) In the *Nelson* case, the court agreed with the district court's conclusion that paddlings administered by guards at the Indiana Boys School violated the Eighth Amendment. The relevant facts in that case, as described by the Seventh Circuit panel, are comparable to the facts developed in the district court with regard to Drew.

Since the plaintiffs' evidence makes a prima facie case of violation of the Eighth Amendment at Drew Junior High School, the dismissal of Count Three of the complaint must be reversed and remanded to the district court for further proceedings. While the defendants must, of course, be afforded an opportunity to offer evidence, the district court may find no reason to require the plaintiffs to offer their evidence a second time. It may proceed with the case as though defendants' motion for dismissal had been denied. See Federal Deposit Insurance Corp. v. Mason, 3 Cir. 1940, 115 F.2d 548; Gulbenkian v. Gulbenkian, 2 Cir. 1945, 147 F.2d 173; 5 Moore ¶ 41.13[2].

The dismissal of Counts One and Two must be reversed and remanded for further proceedings consistent with this opinion. Our examination of the record convinces us that there was sufficient evidence produced by James Ingraham and Roosevelt Andrews to avoid a directed verdict. There was evidence of a system of punishment violative of the Eighth Amendment. There was further evidence from which a jury might conclude that Ingraham and Andrews were victims of this system. Ingraham's description of how he was punished, and the medical evidence concerning the extent of his injuries, would justify sending his case to the jury. Andrews' description of Barnes' alleged assault upon him in the bathroom, and his description of his paddling by Wright in which his wrist was injured, are enough to avoid a directed verdict. On remand, the district court may allow the joinder of whatever state claims the plaintiffs may have, in accordance with the rules concerning pendent jurisdiction. See United Mine Workers v. Gibbs, 1966, 383 U. S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218.[34]

33. Superintendent Whigham testified that he believed there was "an inquiry or objection to that incident [Ingraham paddling of October 6, 1970] by the area office" (Tr. 103). However, Earl Wells, a school district director and administrator, who investigated the Ingraham paddling, testified that as a result of his investigation, "I formulated an opinion that Mr. Wright had a right to paddle the child" (Tr. 234). When asked whether he had formulated an opinion as to whether or not Mr. Wright acted appropriately concerning the paddling of Ingraham, Wells replied, "I think he did" (Tr. 234). Wells explained that he formulated his opinion on the basis of Wright's intent, but admitted that he did not know whether Ingraham had resisted the paddling, and did not find out how many licks Ingraham had received (Tr. 235). We note that specific intent to deprive a person of his constitutional rights is not necessary to maintain a civil rights action. Monroe v. Pape, 1961, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492; Pierson v. Ray, 1967, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288; Whirl v. Kern, 5 Cir. 1969, 407 F.2d 781 and cases cited therein.

34. Counsel for defendants almost conceded as much upon oral argument when in response to an inquiry he stated:

"Your Honor. The class action count was an equitable matter that was tried to the court. When the evidence was finished on that, we had a conference, and it was agreed between the court and the counsel that Mr. Feinberg could present any additional evidence that he wanted to present on the two individual damage counts, then the court would take under advisement my motion for directed verdict on those two counts. Now, he ruled on those two counts that the punishment of Ingraham and the punishment of Andrews didn't rise to constitutional proportions. Ingraham got 20 licks, he had bruises, painful bruises; Andrews had 2 or 3 lickings, of no more than 5 licks each; and the judge simply decided that there was—that these didn't meet any of the four principles of Justice Brennan to rise to the dignity of cruel and unusual punishment, even taking all the evidence and construing it most favorably to the plaintiffs. Now, he said then that if he had been tried for those two counts before a jury, and we had a right to a jury trial and had demanded it on those,—if he had been trying those before a jury, had found no federal deprivation, he could still under the pendent jurisdiction theory have allowed it to go to the jury for damages in tort. However, in this case there would be no saving of judicial time and labor because we would have to go back and have a new jury trial all over again in order to get to that point, so he dismissed all three."

[16] Assuming that Counts One and Two continue to be for jury trial and unless otherwise stipulated, the issues of fact common to the actions at law and the suit in equity must first be heard and determined by a jury's verdict rendered on one or both of Counts One and Two. Beacon Theatres v. Westover, 1959, 359 U.S. 500, 79 S.Ct. 948, 3 L. Ed.2d 988; Dairy Queen v. Wood, 1962, 369 U.S. 469, 473, 82 S.Ct. 894, 8 L.Ed. 2d 44; Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp., 5 Cir. 1961, 294 F.2d 486; Wright & Miller, Federal Practice and Procedure: Civil § 2338.

[17] The complaint is somewhat unclear as to whether the plaintiffs allege that Superintendent Whigham is liable for damages for the paddlings to Ingraham and Andrews. Paragraph 11 of the Complaint states that, "Upon information and belief, the defendant Whigham and/or his agents and employees in the administrative hierarchy of the Dade County school system have knowingly lent their tacit or explicit support and approval to the methods of discipline and behavorial control described herein." Yet neither the "First Cause of Action," relating to Ingraham, nor the "Second Cause of Action," relating to Andrews, mentions Whigham. Possibly the plaintiffs mean to hold Whigham responsible in damages on the basis of a negligence theory along the lines suggested in Roberts v. Williams, 5 Cir. 1972, 456 F.2d 819, 827, modified, 456 F.2d 834. Although we think this matter should be clarified and dealt with initially by the district court, we note that there is some question whether the Eighth Amendment extends to include negligence.[35]

IV.

DUE PROCESS

Plaintiffs allege that corporal punishment as administered in Dade County deprives students of due process of law in violation of the Fourteenth Amendment. They claim that students are provided no procedural safeguards before corporal punishment is imposed. They further claim that corporal punishment violates due process because it is arbitrary, capricious and unrelated to the achievement of any legitimate educational purpose.

A. Policy 5144, as revised effective August 5, 1970, provides the following procedural provisions:

"If it appears that corporal punishment is likely to become necessary, the teacher must confer with the principal. The principal will determine the necessity for corporal punishment and designate the time, place and the person to administer said punishment. In any case, the student should understand clearly the seriousness of the of-

35. Roberts v. Williams, 5 Cir. 1972, 456 F.2d 819, 834 (Simpson, J., specially concurring); Anderson v. Nosser, 5 Cir. 1972, 456 F.2d 835 (*en banc*), 842 (Simpson, J., concurring specially and joined by Gewin, Coleman, Dyer, Morgan, Clark, Ingraham and Roney, JJ.); Parker v. McKeithen, 5 Cir. 1974, 488 F.2d 553, 556 n. 6.

fense and the reason for the punishment. Care should be taken that the period of time between the offense and the punishment is not so long as to cause undue anxiety in the pupil."

The revision effective November 3, 1971 retains the substance of these provisions, with a few additions. Under the revision, the principal may designate an individual with whom the teacher must consult and who may direct the administration of corporal punishment. Also, the principal must maintain a log of all instances where corporal punishment is administered.

Plaintiffs in this case argue that if corporal punishment is not *per se* unconstitutional, still a child has a constitutional right to be free from unwarranted punishment. In reliance upon Dixon v. Alabama, 5 Cir. 1961, 294 F.2d 150, and later cases, the plaintiffs claim that corporal punishment in Dade County is administered without adequate procedural safeguards. The defendants apparently concede that corporal punishment in Dade County is a relatively serious punishment. In their brief they state that "Corporal punishment in the public schools of Dade County, Florida, is a last resort means of discipline as an alternative to suspension or expulsion * * *." (Defendants' Brief, p. 17.) Defendants state that a list of infractions for which corporal punishment would be administered would remove a "judgment aspect" otherwise applicable as to whether such punishment should be administered to a particular student. Defendants further say that a formal hearing would not be desirable because it would lengthen the time before punishment, and lead to undue anxiety on the part of the student involved.

The district court found that, "There is no published schedule of infractions for which corporal punishment is authorized, nor any formal procedural requirements which must be observed before punishment may be administered." In its conclusions of law, the district court stated that,

> "The concept of due process is premised upon fairness and reasonableness in light of the totality of the circumstances then existing. The due process limitation does not unduly confine officials who have the responsibility of governing. Whether the constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors.
>
> "It seems to this Court that if there is any good purpose to be served by corporal punishment in the schools, such purpose would be long since passed if formal notice and hearing were required before a paddling. There has been no deprivation of 'due process.'"

[18] We agree with the district court that the full panoply of procedures associated with the judicial process are not required in determining whether to administer corporal punishment. At the same time, due process demands that the procedures followed by school officials comport with fundamental fairness. See Hannah v. Larche, 1960, 363 U.S. 420, 80 S.Ct. 1502, 4 L.Ed.2d 1307.

The approach outlined in Whatley v. Pike County Board of Education, N.D. Ga.1971, No. 977 (unreported, three-judge district court) suggests an appropriate resolution of the due process question. In a case involving an eleven-year-old pupil, the court said:

> "Where, as here, the pupil was to be promptly corrected for his transgressions, and long-term consequences stemmed only from his refusal to accept his punishment, the flexible elements of due process require only that the student know and understand the rule under which he is to be punished, and that in cases where there is doubt as to the actual offender, further inquiry be made by the school officials concerned."

If a student must "know and understand" the rule under which he is to be punished, then clearly the school authorities must tell him before he is punished

precisely what he has done which merits punishment. If the student concedes that he has engaged in misconduct, then all that remains is to determine whether corporal punishment is appropriate, and to determine the details of its administration. In Dade County, under Policy 5144, the principal or his administrative designee is responsible for making these decisions. Thus, these decisions are usually made by someone who was not directly involved in the circumstances surrounding the alleged misconduct.

[19, 20] If the student concedes that he has engaged in certain conduct, but claims that he did not know that such conduct was prohibited, the school authorities should proceed with caution. Inquiry should be made to determine whether the student knew or should have known that his conduct violated school rules or policies. Punishment of any sort would be patently unfair where the student was genuinely unaware of a school regulation, and had no reason to know that he was engaging in conduct which might later be used as a basis for punishment. Cf. St. Ann et al. v. Palisi et al., 5 Cir. 1974, 495 F.2d 423. The publishing of written rules of conduct would obviously eliminate many problems which might arise in this area.

[21–23] If the student claims that he is innocent of the conduct which merits punishment, school officials should make sufficient inquiries to insure that, to the contrary, the student is guilty beyond any reasonable doubt. After all, once the student is corporally punished, no retraction of punishment is possible. This means that eyewitnesses should be questioned by the principal or his designee and the student should be allowed to call witnesses in his own behalf. Also, the student should be allowed to respond to the witnesses against him, and in some cases he should be accorded an opportunity to ask them relevant questions. Of course, all of this may take place in an informal setting, and no formal rules of procedure or evidence need be followed.

[24] Examining the procedures prescribed under Policy 5144, we find them not inconsistent with the procedures we have outlined. In implementing Policy 5144, most principals probably already follow the procedural guidelines we have suggested. Of course, the testimony of students from Drew indicates that this has not uniformly been the case.[36]

B. Plaintiffs urge that corporal punishment is unrelated to the achievement of any legitimate educational purpose. The testimony of Dr. Kester supports this claim to some extent. Dr. Kester stated that could think of "no reputable authority who recommends corporal punishment" (Tr. 737), and that he could not think of "a renowned or leading authority in psychology, educational psychology, educational research, psychiatry, who advocates corporal punishment in the public schools or in the schools" (Tr. 756). He modified his position somewhat by stating the he could think of no reputable authority who recommended corporal punishment to suppress behavior "without immediately following it as soon as possible with a positive reinforcement of acceptable behavior." Dr. Kester also conceded that there might be some authorities who favored corporal punishment,[37] and that "some may say that it accomplishes the thing that I have already said that it accom-

36. We are particularly disturbed by the testimony that whole classes of students were corporally punished for the misconduct of a few. A number of students claimed that physical education teachers in particular would occasionally give everyone in the class one or two swats when the class was noisy, or when something was stolen. (Tr. 429–31, 591, 637–8, 647, 809–811, 873, 878.) Cf. St. Ann et al. v. Palisi et al., 5 Cir. 1974, 495 F.2d 423.

37. "As I said before, sir, I have not read of someone I consider to be an authority, a leading authority in the field, in fact I can't remember an instance, although I'm sure there is somebody who writes something somewhere who could get it in print—you can get almost anything in print—who said that corporal punishment is a good thing." (Tr. 755–756.)

plished: that you can terminate an unwanted behavior if you are willing to bear the consequences, however negative they may be" (Tr. 756). Also, counsel for plaintiffs stated that he did not propose to establish that there is not a shred of psychological or educational justification for corporal punishment.

[25, 26] In light of the concessions by plaintiffs' expert and plaintiffs' counsel, and in light of other cases involving corporal punishment where there apparently was evidence of the utility of corporal punishment,[38] we are unwilling to say that mild or moderate corporal punishment is unrelated to the achievement of any legitimate educational purpose. However, in this case the severe punishment meted out at Drew went beyond legitimate bounds.

In Dixon v. Alabama, 5 Cir. 1961, 294 F.2d 150, 157, this Court stated:

> "Turning then to the nature of the governmental power to expel the plaintiffs, it must be conceded * * * that that power is not unlimited and cannot be arbitrarily exercised. Admittedly, there must be some reasonable and constitutional ground for expulsion or the courts would have a duty to require reinstatement."

In a recent case, this language was explained as follows:

> "This passage and the constitutional provision it elaborates do not license federal courts to review and revise school board disciplinary actions at will. Application is limited to the rare case where there is shocking disparity between offense and penalty."

Lee v. Macon County Board of Education, 5 Cir. 1974, 490 F.2d 458, 460 n. 3. In the present case, as regards Drew Junior High School, there exists "a shocking disparity" between the offenses committed by various of the students and the harsh punishment imposed by school officials. Thus, we conclude that the system of punishment at Drew not only violated the constitutional prohibition against cruel and unusual punishment, but also violated due process. Cf. Anderson v. Nosser, 5 Cir. 1972, 456 F. 2d 835 (*en banc*); St. Ann et al. v. Palisi et al., *supra*.

V.

RIGHT OF THE PARENT AND CHILD TO PROHIBIT CORPORAL PUNISHMENT BY SCHOOL OFFICIALS

[27] Paragraph 17 of the complaint alleges that following a beating administered to Roosevelt Andrews, Roosevelt's father instructed school officials to refrain from assaulting, beating or otherwise physically injuring his son. Paragraph 18 of the complaint alleges that despite these instructions, Roosevelt was later paddled by school officials. Paragraph 22 of the complaint alleges that corporal punishment abridges a student's right to physical integrity, dignity of personality, and freedom from arbitrary authority in violation of the Fourth, Ninth and Fourteenth Amendments. At trial, Phyllis Straus, the mother of four children who attend Dade County schools, testified that despite her explicit directions, her children had been corporally punished. A number of children, including James Ingraham, testified that they had refused to accept corporal punishment, but were paddled anyway. In our view, the plaintiffs clearly raised the issue of whether school officials may properly administer corporal punishment if the parent or child has objected to its administration.

In Ware v. Estes, N.D.Tex.1971, 328 F.Supp. 657, the district court dismissed an action where the plaintiffs alleged in part that the defendants administered corporal punishment without the prior permission of the parent or student in violation of the Fourteenth Amendment.

38. See Ware v. Estes, *supra*, 323 F.Supp. at 659; Glaser v. Marietta, *supra*, 351 F.Supp. at 557.

The district court's reasoning is revealed by the following portion of its opinion:

> "Under the doctrine of Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1922), the state cannot unreasonably interfere with the liberty of parents and guardians to direct the upbringing and education of children under their control. These parental rights are not beyond limitation. Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 166, 64 S.Ct. 438, 88 L.Ed. 645, 652 (1943). In order for a deprivation of due process under the Fourteenth Amendment, to occur, the rules and policies of the school district must bear 'no reasonable relation to some purpose within the competency of the State.' Pierce v. Society of Sisters, 268 U.S. 510, 535, 45 S.Ct. 571, 573, 69 L.Ed. 1070, 1076 (1924).
>
> "According to the testimony, it cannot be said that the Dallas Independent School District's policy on the use of corporal punishment bears no reasonable relation to some purpose within the competency of the state in its educational function."

328 F.Supp. at 658–659. On appeal, this Court simply stated the following: "We are in agreement with the well-considered memorandum opinion of the district court * * * and its judgment is affirmed." Ware v. Estes, 5 Cir. 1972, 458 F.2d 1360.[39]

The result in *Ware* depends to some extent upon the particular circumstances revealed by the evidence in that case. In the present case, the school authorities have presented no evidence, and so have had no opportunity to demonstrate the extent to which corporal punishment is a useful or necessary disciplinary measure in Dade County.[40] In any event, the approach taken on this issue by the district court in *Ware* deserves re-examination in light of certain recent Supreme Court cases which touch on the relationship of parent and child, and the right of privacy. These cases include Stanley v. Illinois, 1972, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551; Wisconsin v. Yoder, 1972, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15; Roe v. Wade, 1973, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147. It is not appropriate at the present time to attempt to resolve this issue. Instead, we suggest that, upon remand, the district court make findings of fact and conclusions of law on this aspect of the case.

The judgments of dismissal of each of the counts of the complaint are reversed and the cases are remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

LEWIS R. MORGAN, Circuit Judge, dissents.

LEWIS R. MORGAN, Circuit Judge (dissenting):

I respectfully dissent from the holdings of the majority. I feel that the majority opinion is in conflict with our holding in Ware v. Estes, N.D.Texas, 1971, 328 F.Supp. 657, aff'd 5 Cir. 1972, 458 F.2d 1360, cert. den., 409 U.S. 1027, 93 E.Ct. 463, 34 L.Ed.2d 321. The familiar section of the Civil Rights Act under which these actions are founded, 42 U.S.C. § 1983, provides that a person acting under color of state law who deprives another of rights, privileges, or immunities secured by the Constitution shall be liable to the injured party in an action at law or suit in equity. It is, of course, essential to recovery in cases under Section 1983 that the plaintiff estab-

39. In Whatley v. Pike County Board of Education, D.Ga.1971 (unreported, three-judge district court), the court disagreed with plaintiff's argument that "the sanctity of the family relationship, the so-called right of privacy, and the right to physical integrity or dignity of personality" were violated by the Georgia statute authorizing corporal punishment. It is somewhat unclear exactly what the plaintiff in this case argued.

40. It is by no means certain that corporal punishment is of the same importance in every community. See, for example, Glaser v. Marietta, *supra*.

lish an invasion of federally protected constitutional rights; otherwise, there is no federal jurisdiction. Rosenberg v. Martin, 2 Cir. 1973, 478 F.2d 520. However, in a school system such as the Dade County System, with approximately 12,500 teachers and administrative personnel, a student population in excess of 242,000 pupils, and 237 schools, a disciplinary event in one school, Drew Junior High School, cannot give rise to a constitutional question and a right to have the federal courts intervene. For this reason, I would affirm the judgment of the district court which dismissed the actions.

In re YARN PROCESSING PATENT VALIDITY LITIGATION.

SAUQUOIT FIBERS COMPANY,
Plaintiff-Appellee,

v.

LEESONA CORPORATION et al.,
Defendants-Appellants.

KAYSER-ROTH CORPORATION (in its own name and d/b/a Kayser-Roth Hosiery Company and Kayser-Roth Hosiery Co., Inc.), Plaintiff-Appellee,

v.

LEESONA CORPORATION, Defendant-Appellant.

LEESONA CORPORATION, Plaintiff-Appellant,

v.

The DUPLAN CORPORATION et al., Defendants-Appellees.

No. 73-2420.

United States Court of Appeals,
Fifth Circuit.

July 29, 1974.

In a consolidated proceeding, validity of patents was challenged. The United States District Court for the Southern District of Florida at Miami, C. Clyde Atkins, J., 360 F.Supp. 74, granted partial summary judgment of patent invalidity, and the patent owners appealed. The Court of Appeals, Thornberry, Circuit Judge, held that an issue in the instant case as to date of "reduction to practice" was not the same as an issue in a previous Canadian case as to "date of invention," and the doctrine of collateral estoppel was therefore not applicable. The Court also held that an inventor is permitted a reasonable amount of experimentation after he has rendered his idea a reality by constructing a working model substantially embodying claims later to be patented, and during such phase a placing on sale or public use will not bar a patent so long as public use or sale is only incidental to the experimentation. The question as to whether the inventors at the time of licensing still had experimental intent and purpose which would preclude a "public use" or "on sale" bar to patentability was a material fact issue precluding summary judgment.

Reversed and remanded for further proceedings.

1. Patents ⇐80

Under statute, single public use or sale of invention prior to "critical date," i. e., one year before application for patent, will result in invalid patent. 35 U.S.C.A. § 102(b).

2. Patents ⇐76

Even if no delivery is made, existence of sales contract plus reduction of invention to reality in sense that it is beyond stage of experimentation constitutes placing "on sale" within statute precluding right to patent where invention was in public use or on sale in United States more than one year prior to date of application. 35 U.S.C.A. § 102(b).

See publication Words and Phrases for other judicial constructions and definitions.

required by those regulations. Any such determination is a nullity.

Therefore, we conclude that the order of the hearing examiner requiring repayment, since not within the power conferred upon him by regulation, is void, and not properly before us for review.[14] With respect to that portion of the order requiring termination, the decision of the district court is reversed, and the order is reinstated.

Reversed.

Eloise INGRAHAM, as next friend, etc., et al., Plaintiffs-Appellants,

v.

Willie J. WRIGHT, I, Individually, etc., et al., Defendants-Appellees.

No. 73-2078.

United States Court of Appeals,
Fifth Circuit.

Jan. 8, 1976.

Action was brought by parents of public school students seeking compensatory and punitive damages and declaratory and injunctive relief with respect to use of corporal punishment in school system. The United States District Court for the Southern District of Florida, Joe Eaton, J., dismissed the action and the parents appealed. The Court of Appeals, 498 F.2d 248, reversed and remanded. The Court of Appeals, en banc, Lewis R. Morgan, Circuit Judge, held that the school superintendent was a person amenable to suit under Civil Rights Act, that the Eighth Amendment's proscription against cruel and unusual punishment did not apply to school discipline, that infliction of corporal punishment did not deprive students of substantive due process and that the infliction of a paddling did not subject school child to a grievous loss for which Fourteenth Amendment due process standard should be applied.

Affirmed.

Gewin, Circuit Judge, filed an opinion concurring in the result; Godbold, Circuit Judge, with whom Brown, Chief Judge, joined, filed a dissenting opinion; and Rives, Circuit Judge, with whom Goldberg and Ainsworth, Circuit Judges, joined, filed a dissenting opinion.

1. Civil Rights ⇐13.7

School board was not a "person" and could not be sued under Civil Rights Act. 42 U.S.C.A. § 1983.

See publication Words and Phrases for other judicial constructions and definitions.

2. Civil Rights ⇐13.7

School superintendent was a "person" amenable to suit under Civil Rights Act for compensatory and punitive damages and for declaratory and injunctive relief as to use of corporal punishment in school system. 42 U.S.C.A. §§ 1981–1988, 1983; 28 U.S.C.A. §§ 1331, 1343; U.S.C.A.Const. Amend. 8.

3. Criminal Law ⇐1213

Eighth Amendment's proscription against cruel and unusual punishment does not apply to the administration of discipline, through corporal punishment, to public school children by public school teachers and administrators. U.S.C.A. Const. Amend. 8.

4. Criminal Law ⇐1213

Eighth Amendment is intended to be applied only to punishment invoked as a sanction for criminal conduct. U.S.C.A.Const. Amend. 8.

5. Criminal Law ⇐1213

Scrutiny of propriety of physical force used by school teacher upon his or her students should be function of state

14. In so holding, we note that the regulations specifically give the Commissioner the authority to pursue any remedy authorized by law. 45 CFR § 181.15(c).

court with its particular expertise in tort and criminal law questions, and the administration of corporal punishment in public schools, whether or not excessively administered, does not come within scope of Eighth Amendment protection. U.S.C.A.Const. Amend. 8.

6. Schools and School Districts ⇐176

Record in Civil Rights action alleging that infliction of corporal punishment deprived students of liberty without due process of law supported finding that plaintiffs had not shown that the corporal punishment in concept or as authorized by the school board or as applied throughout the school system was arbitrary, capricious, or wholly unrelated to legitimate state purpose of determining its educational policy. U.S.C.A. Const. Amend. 14; West's F.S.A. § 232.27.

7. Constitutional Law ⇐253(2)

Right to substantive due process is a guaranty against arbitrary legislation, demanding that the law not be unreasonable and that the means selected shall have a real and substantial relation to object sought to be obtained; test is whether there be a matter touching public interest which merits instant correction at hands of authorities and, if so, that remedy adopted by rule-making authority be reasonably calculated to correct it.

8. Schools and School Districts ⇐169

Maintenance of discipline and order in public schools is a prerequisite to establishing most effective learning atmosphere and as such is a proper object for state and school board regulation.

9. Constitutional Law ⇐253(2)

Corporal punishment of public school students as one of the means used to achieve an atmosphere which facilitates effective transmittal of knowledge does have a real and substantial relation to the object sought to be obtained and does not constitute a violation of substantive due process. U.S.C.A.Const. Amend. 14; West's F.S.A. § 232.27.

10. Schools and School Districts ⇐176

Court having determined that corporal punishment itself and that corporal punishment as circumscribed by school board guidelines as set forth in its policy statement was not arbitrary, capricious or unrelated to legitimate educational goals refused to look at each individual instance of punishment to determine if it had been administered arbitrarily or capriciously, since to do so would be a misuse of judicial power; particularly in view of possibility of a civil or criminal action in state court against teacher who has excessively punished child. U.S.C.A. Const. Amend. 14; West's F.S.A. § 232.27.

11. Constitutional Law ⇐253(2)

Concept of due process is premised on fairness and reasonableness in light of total circumstances.

12. Constitutional Law ⇐253(2)

Infliction of a paddling does not subject public school child to a grievous loss for which Fourteenth Amendment due process standards should be applied. U.S.C.A.Const. Amend. 14.

13. Courts ⇐96(3)

Lower courts are bound by summary decisions of United States Supreme Court until that Court informs them otherwise.

Alfred Feinberg, Miami, Fla., for plaintiffs-appellants.

Frank A. Howard, Jr., Thomas G. Spicer, James A. Smith, Miami, Fla., for defendants-appellees.

Appeal from the United States District Court for the Southern District of Florida.

Before BROWN, Chief Judge, RIVES, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, CLARK, RONEY and GEE, Circuit Judges.*

* Circuit Judge Wisdom took no part in the consideration or decision of this case, en banc.

LEWIS R. MORGAN, Circuit Judge:

Plaintiffs James Ingraham and Roosevelt Andrews, two junior high school students in Dade County, Florida, filed a complaint containing three counts on January 7, 1971. Counts one and two were individual actions for compensatory and punitive damages brought under 42 U.S.C. §§ 1981–88, with jurisdiction claimed under 28 U.S.C. § 1331 and § 1343. Plaintiffs claimed that personal injuries resulted from corporal punishment administered by certain defendants in alleged violation of their constitutional rights, in particular their right to freedom from cruel and unusual punishment. Specifically, plaintiff Ingraham alleges in count one that on October 6, 1970, defendants Principal Wright and Assistant Principals Deliford and Barnes struck plaintiff repeatedly with a wooden instrument, injuring plaintiff and causing him to incur medical expenses. Plaintiff testified that this paddling was precipitated by his and several other children's disruption of a class over the objection of the teacher. Defendant Wright removed plaintiff and the other disruptive students to his office whereupon he paddled eight to ten of them. Wright had initially threatened plaintiff with five blows, but when the latter refused to assume a paddling position, Wright called on defendants Deliford and Barnes who held plaintiff in a prone position while Wright administered twenty blows. Plaintiff complained to his mother of discomfort following the paddling, whereupon he was taken to a hospital for treatment. Plaintiff introduced evidence that he had suffered a painful bruise that required the prescription of cold compresses, a laxative, sleeping and pain-killing pills and ten days of rest at home and that prevented him from sitting comfortably for three weeks.

Plaintiff Andrews alleges two incidents of corporal punishment as the basis for his claim for damages in count two of the complaint. Plaintiff alleges that on October 1, 1970, he, along with fifteen other boys, was spanked in the boys' restroom by Assistant Principal Barnes. Plaintiff testified that he was taken by a teacher to Barnes for the offense of tardiness, but that he refused to submit to a paddling because, as he explained to Barnes, he had two minutes remaining to get to class when he was seized and was not, therefore, guilty of tardiness. Barnes rejected plaintiff's explanation and, when plaintiff resisted punishment, struck him on the arm, back, and across the neck.

Plaintiff Andrews was again spanked on October 20, 1970. Despite denials of guilt, plaintiff was paddled on the backside and on the wrist by defendant Wright in the presence of defendants Deliford and Barnes for having allegedly broken some glass in sheet metal class. As a result of this paddling, plaintiff visited a doctor and received pain pills for the discomfort, which lasted approximately a week.

Count three is a class action brought by plaintiffs Ingraham and Andrews as representatives of the class of students of the Dade County school system who are subject to the corporal punishment policies issued by defendant members of the Dade County School Board. This count seeks final injunctive and/or declaratory relief against the use of corporal punishment in the Dade County School System and can be divided into three constitutional arguments. First plaintiffs claim that infliction of corporal punishment on its face and as applied in the present case constitutes cruel and unusual punishment in that its application is grossly disproportionate to any misconduct in which plaintiffs may have engaged. Second, plaintiffs claim that because it is arbitrary, capricious and unrelated to achieving any legitimate educational goal, corporal punishment deprives all students of liberty without due process of law in violation of the Fourteenth Amendment. Plaintiffs also allege that the failure of defendants to promulgate a list of school regulations and corresponding punishments increases the capriciousness of the punishment. Finally, plaintiffs claim that defendants'

failure to provide any procedural safeguards before inflicting corporal punishment on students, including adequate notice of alleged misconduct, hearing, examination and cross-examination, representation and notice of rights, constitutes summary punishment and deprives students of liberty without due process of law in violation of the Fourteenth Amendment.

Plaintiffs presented their evidence in count three of the complaint in a week-long trial before the district court without a jury. At the close of plaintiffs' case, defendants moved for dismissal under Rule 41(b), F.R.Civ.P. which provides in part:

> After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

By agreement of the parties the court considered the evidence offered to support count three as having been offered on counts one and two and as if upon motion for directed verdict for these two counts. The district court then dismissed count three of the complaint and, concluding that a jury could not lawfully find that either of the plaintiffs sustained a deprivation of constitutional rights, likewise dismissed counts one and two.

I. Jurisdiction.

[1, 2] Defendants assert that there is no federal jurisdiction over count three under 42 U.S.C. §§ 1981–1988 and 28 U.S.C. § 1331 and § 1343 because the Dade County School Board and the Superintendent of Schools, Edward L. Whigham, are not "persons" and hence are not amenable to suit. Defendants rely on *City of Kenosha v. Bruno*, 412 U.S. 507, 93 S.Ct. 2222, 37 L.Ed.2d 109 (1973), in which the Supreme Court held that a municipality was not a "person" within the meaning of § 1983. While it is well-settled that a school board is not a "person" and thus cannot be sued under § 1983, it is clear that a school superintendent is a "person" amenable to suit. *Sterzing v. Fort Bend Independent School District*, 496 F.2d 92, at 93, n. 2 (5th Cir. 1974). We, therefore, hold that jurisdiction was improperly granted against the Dade County School Board and, accordingly, that part of the complaint must be dismissed. Jurisdiction to proceed against Edward L. Whigham, Superintendent of Schools, was, however, properly granted.

II. Cruel and Unusual Punishment.

[3] Plaintiff-appellants allege that the infliction of corporal punishment on public school children on its face, and as applied in the instant case, constitutes cruel and unusual punishment under the Eighth Amendment sufficient to entitle plaintiffs to damages and injunctive relief against the Dade County School Board under § 1983. We do not agree. It is the opinion of the majority of this court that the Eighth Amendment does not apply to the administration of discipline, through corporal punishment, to public school children by public school teachers and administrators.

[4] The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Not only the connotation of the words "bail,"

and "fine," but the legislative history[1] concerning enactment of the bill of rights supports an argument that the Eighth Amendment was intended to be applied only to punishment invoked as a sanction for criminal conduct.[2] Indeed, Supreme Court decisions which have interpreted the Amendment have focused on the inherent cruelty of penalties "inflicted by a judicial tribunal in accordance with law and retribution for *criminal conduct*." *Negrich v. Hohn*, 246 F.Supp. 173 (W.D.Pa.1965), *affirmed on other grounds*, 379 F.2d 213 (3rd Cir. 1967) (emphasis added). *E. g., Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (death penalty as cruel and unusual punishment); *Robinson v. California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962) (state's imprisonment of narcotics addict as cruel and unusual punishment); *Weems v. United States*, 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793 (1910) (disproportionate punishment of fifteen years to hard labor for conviction of strict liability offense as cruel and unusual punishment).

Although the Supreme Court has not yet discussed the applicability of the Eighth Amendment to corporal punishment administered in the public schools, a few lower courts have considered the issue and divided on its resolution.[3] We

1. The legislative history surrounding the enactment of the cruel and unusual clause indicates that it was intended to prevent the tortious and barbarous methods used in some European countries to extort confessions and to punish crimes. The following argument delivered in favor of the proposed "cruel and unusual clause" of the Bill of Rights indicates the intended limits of its scope:

> [Congress will] have to ascertain, point out, and determine, what kinds of punishments shall be inflicted on persons *convicted of crimes*. They are nowhere restrained from inventing the most cruel and unheard of punishments and annexing them to *crimes*; and there is no constitutional check of them, but that racks and gibbets may be amoungst the most mild instruments of their discipline.

Granucci, *Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*, 57 Cal.L.Rev. 839 at 841 (1969), quoting from 2 *J. Elliot*, The Debates in the Several State Conventions on the Adoption of the Federal Constitution, 111 (2d Ed. 1881). (Emphasis added).

2. We are not persuaded by the majority's argument in the original panel decision that the Supreme Court decision in *Trop v. Dulles* requires a holding that the Eighth Amendment reaches the administration of corporal punishment in public schools:

> It was succinctly stated in Vol. 6 Harv.Civ. Rights—Civ.Lib.L.Rev., Corporal Punishment in the Public Schools, p. 585, n. 24: "In *Trop v. Dulles*, 356 U.S. 86, 94–100 [78 S.Ct. 590, 2 L.Ed.2d 630] (1958), the Supreme Court, in applying the eighth amendment to all punishments inflicted pursuant to 'penal laws,' set forth two tests to determine the meaning of penal. First, there must be the imposition of a 'disability for the purpose of punishment.' *Id.* at 96 [78 S.Ct. 590]. Second, there must be the prescription of a 'consequence that will befall one who fails to abide by regulating provisions . . . .' *Id.* at 97 [78 S.Ct. 598].
>
> "Infliction of corporal punishment by public school personnel meets both tests." *Ingraham v. Wright*, 498 F.2d 248, 259–60, n. 20 (5th Cir. 1974).
>
> In *Trop v. Dulles*, the Supreme Court was addressing the constitutional propriety of § 401(g) of the Nationality Act of 1940 which provides for the loss of United States citizenship by a national who has deserted the military forces of the United States during a time of war and who has been convicted by court-martial. In setting up a "purpose" test to determine what is "penal" and what is thereby within the scope of the Eighth Amendment's prohibition against cruel and unusual punishment, the court was countering the government's argument that the statute was "non-penal" in that it provided for loss of citizenship as opposed to incarceration. 356 U.S. 96, 98–99, 78 S.Ct. 590, 2 L.Ed.2d 630, 641.
>
> Yet, the court in *Trop v. Dulles* was still addressing the imposition of an essentially *criminal* sanction. The court several times refers to the desertion for which defendant was losing his citizenship, as a "crime;" e. g., 356 U.S. at 96, 78 S.Ct. 590, 2 L.Ed.2d at 640. In addition, denationalization under 401(g) could occur only after conviction by court-martial under 10 U.S.C. § 885, enacted August 10, 1956. The loss of citizenship found to be reached by the Eighth Amendment in *Trop* contains elements of criminal sanctions imposed by a judicial tribunal which are strikingly absent in the application of discipline in the public schools.

3. Decisions discussing the applicability of the Eighth Amendment to corporal punishment administered in the public schools can be classified into three groups: (1) case holding that the Eighth Amendment does apply to c poral

concur with the approach taken by the two district courts that have held the Eighth Amendment to be inapplicable to corporal punishment in public schools. In *Sims v. Waln, supra*, the court dismissed an action for damages and injunctive relief arising out of facts similar to those present in the instant case, stating:

> Regarding the Eighth Amendment claim there is an initial distinction that must be made between criminal penalties and civil penalties. The distinction must be made because the *Eighth Amendment is not applicable in a civil context.* Concerning the Cruel and Unusual Punishment clause of the Eighth Amendment the Supreme Court has stated that: '*the primary purpose of that clause has always been considered, and properly so, to be directed at the method or kind of punishment imposed for the violation of criminal statutes* . . . .' *Powell v. Texas*, 392 U.S. 514, 531–32, 88 S.Ct. 2145, 2154, 20 L.Ed.2d 1254 (1968). *Id.* at 549 (emphasis added).

Likewise, in *Gonyaw v. Gray, supra*, the district court of Vermont, in dismissing an action for damages and injunctive relief against a school board which imposed corporal punishment on its students, stated:

> . . . it is, of course, essential to recovery in both cases under § 1983 that the plaintiff establish an invasion of federally protected constitutional rights . . . . *Mere tortious conduct* does not constitute a deprivation of constitutional rights under this statute.
>
> This statute [authorizing corporal punishment] does not offend the protection against cruel and unusual punishment since this amendment provides a limitation against penalties imposed for criminal behavior. . . . Since neither plaintiff was punished for an offense which was criminal in nature, the Eighth Amendment does not proscribe the conduct assigned to the defendants. *Id.* at 368 (emphasis added.)[4]

In support of their argument that corporal punishment in a public school context is cruel and unusual punishment, appellants cite *Jackson v. Bishop*, 8 Cir. 1968, 404 F.2d 571 in which the Eighth Circuit Court of Appeals enjoined the use of a strap in prisons. We do not find prisons and public schools to be analogous in the context of Eighth Amendment coverage. As discussed, *supra*, the function of the Eighth Amendment's prohibition against cruel and unusual punishments was intended to prevent the imposition of unduly harsh penalties for criminal conduct. It is not an unreasonable interpretation of the Eighth Amendment to include within its coverage discipline imposed upon persons incarcerated for criminal conduct, since such discipline is part of the total punishment to which the individual is being subjected for his crime and, as such, is a proper subject for Eighth Amendment scrutiny. To extend the *Jackson* case from a prison context to a public school situation would, however, distort the intended scope of the Amendment.[5]

We do not mean to imply by our holding that we condone child abuse, either in the home or the schools. We abhor any exercise of discipline which could result in serious or permanent injury to the child. Indeed, if the force used by defendant teachers in disciplining plaintiff was as severe as plaintiffs allege, a Florida state court could find defendants civilly and criminally liable for tortious conduct exceeding the level of severity authorized by 232.27 of Fla.Stat.Ann. and by Dade County School Board policy 5144. The basis of such actions is, however, tort and criminal law, *not* federal constitutional law. We find it neither proper nor necessary to expand the Eighth Amendment beyond its intended and reasonable scope to encompass an action which is essentially based on the commission of a battery.

[5] In short, scrutiny of the propriety of physical force used by a school teacher upon his or her student should be the function of a state court, with its particular expertise in tort and criminal law questions; the administration of corporal punishment in public schools, whether or not excessively administered, does not come within the scope of Eighth Amendment protection. Because the plaintiffs do not allege facts which could support a finding that defendants have deprived them of their right to freedom from cruel and unusual punishment, neither the legal action for damages included in counts one and two nor the equitable action for injunctive relief set out in count three can lie.

III. Substantive Due Process.

Plaintiffs allege that "the infliction of corporal punishment on its face deprives all students as well as plaintiffs . . . of 'liberty without due process of law' in violation of the Fourteenth Amendment to the United States Constitution since it is arbitrary, capricious, and unrelated to achieving any legitimate educational purpose." In essence, plaintiffs here allege a deprivation of their right to substantive due process, as this right to freedom from arbitrary governmental action has come to be known. We find this argument unpersuasive.

Statutory authority for the use of corporal punishment in Florida public schools is found by implication in § 232.27 of Fla.Stat.Ann. which provides:

> Each teacher or other member of the staff of any school shall assume such authority for the control of pupils as may be assigned to him by the principal and shall keep good order in the

punishment in public schools—*Bramlett v. Wilson*, 495 F.2d 714 (8th Cir. 1974); (2) cases holding that the Eighth Amendment does not apply to corporal punishment in public schools—*Sims v. Waln*, 388 F.Supp. 543 (S.D. Ohio 1974), and *Gonyaw v. Gray*, 361 F.Supp. 308 (D.Vt.1973), and (3) cases that assume, without deciding, that the Eighth Amendment applies to imposition of corporal punishment in schools but that in instant case determine that punishment complained of was not severe enough to constitute cruel and unusual punishment—*Baker v. Owen*, 395 F.Supp. 294 (M.D. N.C.1975), aff'd — U.S. —, 96 S.Ct. 210, 46 L.Ed.2d 137 (1975); *Glaser v. Marietta*, 351 F.Supp. 555 (W.D.Pa.1972); *Ware v. Estes*, 328 F.Supp. 657 (N.D.Tex.1971), aff'd *per curiam*, 458 F.2d 1360 (5th Cir. 1972); *Whatley v. Pike County Board of Education*, C.A. 977 (N.D.Ga.1971) (three judge court); and *Sims v. Board of Education*, 329 F.Supp. 678 (D.N.M. 1971).

4. The district court of Vermont has recently granted jurisdiction under 28 U.S.C. § 1343(3) to entertain a claim that administration of excessive corporal punishment violated the student-claimant's right to freedom from cruel and unusual punishment. *Roberts v. Way*, 398 F.Supp. 856 (D.Vt.1975). The court distinguished *Roberts* from *Gonyaw v. Gray, supra*, in which less severe punishment was alleged. The extent of the holding, however, was merely a finding that the claim was not so wholly insubstantial or frivolous as to divest the court of jurisdiction; the applicability of the Eighth Amendment to severe corporal punishment was not reached.

5. Even assuming that the Eighth Amendment was equally applicable to corporal punishment imposed by school authorities, we would not necessarily adopt the holding of the *Jackson* court that corporal punishment is per se cruel and unusual, since there are many practical differences between prisons and public schools that would tend to mitigate the use of such discipline in the latter institution. First, the *Jackson* court was concerned with the absence of safeguards necessary to prevent abuses in the imposition of corporal punishment by prison officials. The much greater access of school children through their parents to public opinion and to the political process, in addition to the natural restraint that generally exists when one strikes a child, deters excessive conduct by the school official administering corporal punishment. Also, central to the *Jackson* court's finding that use of a strap was cruel and unusual was its belief that such punishment, when imposed on prisoners, "offend[s] contemporary concepts of decency and human dignity." *Id.* at 579. While whipping an adult prisoner is sufficiently degrading to offend "contemporary concepts of decency," we cannot believe paddling a child, a long-accepted means of disciplining and inculcating concepts of obedience and responsibility, offends current notions of decency and human dignity. *See also Nelson v. Heyne*, 491 F.2d 352 (7th Cir. 1974) in which the court held that paddling of juveniles in a correctional institute constituted cruel and unusual punishment, but that corporal punishment administered in public schools could be upheld. *Id.* at 356.

classroom and in other places in which he is assigned to be in charge of pupils, *but he shall not inflict corporal punishment before consulting the principal or teacher in charge of the school, and in no case shall such punishment be degrading or unnecessarily severe in its nature.* (Emphasis added.)

In addition the Dade County School Board Policy 5144, effective at the time plaintiff's cause of action arose, explicitly authorized corporal punishment, setting forth guidelines under which it was to be administered.[6]

[6–9] After reviewing the record, we agree with the district court's finding that "the evidence has not shown that corporal punishment in concept, or as authorized by the school board, or as applied throughout the school system, is arbitrary, capricious, or wholly unrelated to the legitimate state purpose of determining its educational policy." The plaintiffs' right to substantive due process is

> . . . a guaranty against arbitrary legislation, demanding that the law not be unreasonable and that the means selected shall have a real and substantial relation to the object sought to be attained. The test is whether there be a matter touching the public interest which merits instant correction at the hands of the authorities and, if so, that the remedy adopted by the rule-making authorities be reasonably calculated to correct it. *Sims v. Board of Education, supra,* at 684.

Certainly, maintenance of discipline and order in public schools is a prerequisite to establishing the most effective learning atmosphere and as such is a proper object for state and school board regulation.[7] Without the existence of discipli-

6. Policy 5144 provides in part:

II. Punishment: Corporal Punishment

Punishment in the general sense is the inflicting of a penalty for an offense. Corporal punishment is generally applied to the body of the offender or is physical punishment as opposed to other forms of punishment and is administered as a means of changing the behavior of the student. Therefore, it is important to analyze whether or not this goal will be accomplished by such action.

Corporal punishment may be used in the case where other means of seeking cooperation from the student have failed. If it appears that corporal punishment is likely to become necessary, the teacher must confer with the principal. The principal will determine the necessity for corporal punishment and designate the time, place, and the person to administer said punishment. In any case, the student should understand clearly the seriousness of the offense and the reason for the punishment. Care should be taken that the period of time between the offense and the punishment is not so long as to cause undue anxiety in the pupil. The punishment must be administered in kindness and in the presence of another adult, at a time and under conditions not calculated to hold the student up to ridicule or shame.

In the administering of corporal punishment, no instrument shall be used that will produce physical injury to the student, and no part of the body above the waist or below the knees may be struck. The person administering the corporal punishment must realize his own personal liabilities if the student being given corporal punishment is physically injured.

Corporal punishment should never be administered to a student whom school personnel know to be under psychological or medical treatment unless there has been a preconference with the school psychologist or the physician.

Policy 5144 was revised extensively, effective November 3, 1971, almost ten months after this action was filed. The revision sets a maximal limit on the number of strokes which can be applied (five for elementary school children and seven for junior and senior high school children), requires punishment to be administered "posteriorly" and in no case about the head and shoulders, emphasizes consideration of the seriousness of the offense in determining the proper punishment, and requires a recording of the infraction which justified the punishment.

7. *See Sims v. Waln,* 388 F.Supp. 543 (S.D.Ohio 1975), in which the court stated:

> A teacher is responsible for the discipline in his school, and for the progress, conduct, and deportment of his pupils. It is his duty to maintain good order and to require of his pupils a faithful performance of their duties. To enable him to discharge such a duty effectively, he must have the power to enforce prompt obedience to his lawful commands. For this reason, in proper cases, he may inflict corporal punishment on refractory pupils. *Id.* at 546.

nary sanctions for misbehavior, students who desire to learn would be deprived of their right to an education by the more disruptive members of their class. We are unwilling to hold that corporal punishment, as one of the means used to achieve an atmosphere which facilitates the effective transmittal of knowledge, has no "real and substantial relation to the object sought to be attained."

[10] Certainly the guidelines set down in Policy 5144 establish standards which tend to eliminate arbitrary or capricious elements in any decision to punish. Having determined that corporal punishment itself and corporal punishment as circumscribed by the guidelines in Policy 5144 is not arbitrary, capricious, or unrelated to legitimate educational goals, we refused to look at each individual instance of punishment to determine if it has been administered arbitrarily or capriciously. We think it a misuse of our judicial power to determine, for example, whether a teacher has acted arbitrarily in paddling a particular child for certain behavior or whether in a particular instance of misconduct five licks would have been a more appropriate punishment than ten licks. We note again the possibility of a civil or criminal action in state court against a teacher who has excessively punished a child.[8]

We emphasize that it is not this court's duty to judge the wisdom of particular school regulations governing matters of internal discipline. Only if the regulation bears no reasonable relation to the legitimate end of maintaining an atmosphere conducive to learning can it be held to violate the substantive provision of the due process laws. Paddling of recalcitrant children has long been an accepted method of promoting good behavior and instilling notions of responsibility and decorum into the mischievous heads of school children. We do not here overrule it.

8. Indeed, Policy 5144, as effective during 1970–71, provides in part: "The person administering the corporal punishment must realize his own personal liabilities if the student being given corporal punishment is physically injured."

IV. Procedural Due Process.

Plaintiffs also allege as part of their claim for injunctive and declaratory relief that defendants have deprived the class which plaintiffs represent of its right to procedural due process. Plaintiffs argue that procedural due process requires (1) that a schedule of school regulations and punishments to be accorded for their breach be established; (2) that notice be given to the student of the offense for which he is to be punished, and (3) that a hearing with opportunity for examination and cross-examination and with a right to counsel be accorded before punishment is inflicted.

[11, 12] The concept of due process is premised upon fairness and reasonableness in light of the totality of circumstances. *Hannah v. Larche,* 363 U.S. 420, 80 S.Ct. 1502, 4 L.Ed.2d 1307 (1960); *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, 71 S.Ct. 624, 95 L.Ed. 817 (1951). "[W]hether any protections are due depends on the extent to which an individual will be 'condemned to suffer *grievous loss.*'" *Joint Anti-Fascist Refugee Committee v. McGrath, supra,* at 168, 71 S.Ct. at 646 (Frankfurter, J., concurring), quoted in *Morrissey v. Brewer,* 408 U.S. 471, at 481, 92 S.Ct. 2593, at 2600, 33 L.Ed.2d 484 (1972) (emphasis added). We do not believe that infliction of a paddling subjects a schoolchild to a grievous loss for which Fourteenth Amendment due process standards should be applied.

[13] In its argument for procedural safeguards, the dissent relies on *Baker v. Owen, supra,* a three-judge district court judgment summarily affirmed by the Supreme Court. In *Baker,* the three-judge district court upheld a North Carolina statute authorizing corporal punishment against plaintiffs' argument that the constitutional concept of familial privacy bars school officials from spanking school children over parental objection. In addition, the court set forth certain

procedural requirements to accompany the administration of corporal punishment. The Supreme Court's affirmance of this three-judge district court judgment was a summary affirmance without opinion. The appeal of that lower court judgment was brought only by the plaintiffs and the only question presented to the Supreme Court was whether parental objection could bar the use of corporal punishment by school officials; defendant state and school officials did not appeal that part of the judgment requiring procedural safeguards. Accordingly, the three-judge district court's pronouncement on procedural requirements was never before the Court and, therefore, its summary affirmance of that lower court's judgment does not bind us to a part of the judgment not appealed.[9]

In holding that procedural safeguards accompanying the use of corporal punishment in public schools are not constitutionally mandated, we are cognizant of the Supreme Court's holding in *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975), that an Ohio statute authorizing suspension of public school students without notice of the offense for which suspended and without opportunity for a hearing violates students' rights to procedural due process. The basis for the Court's holding that due process should have been afforded plaintiffs was its determination that education was a substantial property interest that the State of Ohio had conferred on plaintiffs and "having chosen to extend the right to an education to people of appellees' class generally, Ohio may not withdraw that right on grounds of misconduct absent fundamentally fair procedures . . . ." *Id.*, 419 U.S. at 574, 95 S.Ct. at 736, 42 L.Ed.2d at 734.[10] Noting that a recorded suspension could harm a student's reputation and interfere with later opportunities for higher education and employment, the Court also held that a student's "liberty" interest in maintaining his good name and reputation could not be arbitrarily deprived by a suspension unattended by proper procedures. We believe that there is an important distinction in

9. While the Supreme Court has held that lower courts are bound by summary decisions of the Supreme Court until that Court informs them otherwise, *Hicks v. Miranda*, —— U.S. ——, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975), we believe that *Hicks* can be readily distinguished from the present case. In *Hicks*, the Supreme Court was dealing with the precedential value of a dismissal for want of a substantial federal question; in its holding that such a dismissal carried the same impact as a disposition on the merits, the Court was countering the argument that the precedential value of a dismissal was equivalent only to that of a denial of certiorari. The Court's holding certainly cannot be interpreted to mean that a summary affirmance by the Supreme Court of a lower court judgment is binding on questions not presented to that Court on appeal. *See, Swarb v. Lennox*, 405 U.S. 191, 92 S.Ct. 767, 31 L.Ed.2d 138 (1972) (Supreme Court's affirmance of District Court judgment insofar as it refused to declare a state's statute unconstitutional does not constitute approval of other aspects and details not before Supreme Court where no cross appeal taken by defendant).

10. In applying the "grievous loss" standard, discussed *supra*, to the present facts we are not ignoring the "de minimus" test employed in *Goss* in which the court stated: " 'Whether due process requirements apply in the first place, we must look not to the "weight" but to the *nature* of the interest at stake.' *Board of Regents v. Roth*, 408 U.S. [564], at 570–71, 92 S.Ct. [2701] at 2705–2706, 33 L.Ed.2d 548. . . . The Court's view has long been that as long as a property deprivation is not de minimus, its gravity is irrelevant to the question whether account must be taken of the Due Process Clause." *Id.* 419 U.S. at 575, 95 S.Ct. at 737, 42 L.Ed.2d at 735. In so holding, the court was responding to an argument that because a ten-day suspension did not subject a student to a grievous loss, the due process clause did not come into play. Thus, according to the court's reasoning, because total exclusion from the educational process is itself a substantial interest to be protected by the due process clause, the shortness of that period of exclusion cannot suspend the guarantee of procedural safeguards. There is a qualitative difference between an exclusion from the educational process, through suspension, and a routine disciplinary measure such as paddling. The infliction of a paddling, unlike the denial itself of educational benefits, does not subject the student to a "grievous loss" for which constitutionally mandated procedural safeguards apply.

terms of the applicability of due process standards between a suspension, which involves an exclusion from the educational process itself, and a paddling, which involves no deprivation of a property interest or denial of a claim to education and which is certainly a much less serious event in the life of a child than is a suspension or an expulsion.[11] Likewise, we find no substantial interest in reputation violated by a paddling, for while a recorded suspension can indeed have a permanent adverse impact on a person's reputation and could conceivably harm that person's chance to obtain employment or higher education, we find it difficult to contend that a paddling, a commonplace and trivial event in the lives of most children, involves any such damage to reputation.

It seems to us that the value of corporal punishment would be severely diluted by elaborate procedural process imposed by this court.[12] To require, for example, a published schedule of infractions for which corporal punishment is authorized, would serve to remove a valid judgmental aspect from a decision which should properly be left to the experienced administrator. Likewise, a hearing procedure could effectively undermine the utility of corporal punishment for the administrator who probably has little time under present procedures to handle all the disciplinary problems which beset him or her. "[T]o hold that the relationship between parents, pupils, and school officials must be conducted in an adverse atmosphere and according to procedural rules by which we are accustomed in a court of law would hardly best serve the interest of any of those involved." *Whatley v. Pike County Board of Education, supra.* "The likelihood of the abuse of corporal punishment is minimized by the participation of parents and school boards in school affairs, and by the availability of civil and criminal sanctions against teachers who exceed the limits of moderation. In any event, it is a sanction which simply is not serious enough to require the prerequisite of a formal hearing." *Gonyaw v. Gray, supra*, at 371.

In essence, we refuse to set forth, as constitutionally mandated, procedural standards for an activity which is not substantial enough, on a constitutional level, to justify the time and effort which would have to be expended by the school in adhering to these procedures or to justify further interference by federal courts into the internal affairs of public schools. If a paddling of a school child subjects him to a "grievous loss" sufficient to require constitutional procedural safeguards under the Fourteenth Amendment, then conceivably a teacher's decision to keep a disobedient child after school or to give a child a failing grade in a course would inflict just as grievous a loss and would require procedures which meet constitutional standards. We do not interpret the due process clause of the Fourteenth Amendment so broadly. In so holding, we are mindful of the oft-quoted statement made by Justice Fortas in *Eppersen v. Arkansas*, 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968), in which he asserted:

> Judicial interposition in the operation of the public school systems of the nation raises problems requiring care and restraint. . . . By and large, public education in our nation is committed to the control of state and local

11. Indeed, this court has often recognized the applicability of the due process clause to expulsions and suspensions. *E. g., Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961), cert. denied, 368 U.S. 930, 82 S.Ct. 368, 7 L.Ed.2d 193 (1961) (due process applicable to a removal for long enough duration to be classified as expulsion); *Black Students of North Fort Myers Jr.-Sr. High School v. Williams*, 470 F.2d 957 (5th Cir. 1972) (due process applicable to a ten-day suspension).

12. Dade County School Board Policy 5144 does contain guidelines by which corporal punishment is to be administered. It requires, for example, that the "student understand clearly the seriousness of the offense and the reason for the punishment." If the Policy guidelines are not followed, students would have redress to the School Board.

authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values. *Id.* at 104, 89 S.Ct. at 270, 21 L.Ed.2d at 234.

Affirmed.

GEWIN, Circuit Judge (concurring in the result).

Although I am in full agreement with the majority's resolution of the merits of this case, it is my considered judgment that the jurisdictional statement in the opinion is not in accord with recent decisions of our court. Accordingly, I concur in the majority's affirmance of the district court's dismissal of the complaint, but do not fully agree with the jurisdictional statement.

The majority is quite correct in its conclusion that school boards are often considered to be either arms of or in the nature of municipalities. Hence, under the "non-person" rule of *City of Kenosha v. Bruno*, 412 U.S. 507, 93 S.Ct. 2222, 37 L.Ed.2d 109 (1973), school boards as entities are not subject to suit under § 1983 [1] and its jurisdictional statute, § 1343.[2] Likewise, the majority opinion is equally correct in its conclusion that a school superintendent is a "person" liable to suit under § 1983.

However, I disagree with the majority's indication that merely because § 1983 jurisdiction over the school board in this case does not exist, there is a lack of jurisdiction in every case involving school boards. We have recently held [3] that, despite the fact that § 1983 jurisdiction over a school board may not be present in a given instance, jurisdiction may be proper under § 1331.[4]

Since I agree with the majority that appellants have not asserted a constitutional claim for relief,[5] the dismissal was proper because § 1331 is of no aid in the absence of such a claim. I do not agree that the mere failure to state a § 1983 claim automatically defeats federal jurisdiction under § 1331.

GODBOLD, Circuit Judge, with whom BROWN, Chief Judge, joins (dissenting):

I agree with Judge Rives that arbitrary and excessive corporal punishment is a denial of substantive due process, although I am not convinced that the punishment in this case rose to the level of such a violation. I, therefore, disagree with the majority's statement that it would be an abuse of our judicial power to determine whether punishment inflicted in a particular case exceeds constitutional limits. This is a mere rule of convenience, made palatable by characterizing the issue as the difference between five and ten licks. I doubt that the majority really means what it says, and I suspect that if in a future case the punishment inflicted has broken the victim's leg we will face the issue and hold that substantive due process has been violated.

1. 42 U.S.C. § 1983.

2. 28 U.S.C. § 1343.

3. *E.g.*, *Roane v. Callisburg Independent School District*, 511 F.2d 633, 635 n.1 (5th Cir. 1975) (citations omitted); *Kelly v. West Baton Rouge Parish School Board*, 517 F.2d 194, 197 (5th Cir. 1975) (citations omitted). Other circuits have utilized the same rationale in holding that *Kenosha* does not bar § 1331 jurisdiction over a municipality, *Brault v. Town of Milton*, — F.2d — (2d Cir. 1975) [No. —, Feb. 24, 1975], or a county, *Cox v. Stanton* (4th Cir. 1975) [No. —, Oct. 6, 1975].

4. 28 U.S.C. § 1331.

5. Although we have not hesitated to find due process and equal protection violations in a variety of circumstances involving schools, *e.g.*, *Lansdale v. Tyler Junior College*, 470 F.2d 659 (5th Cir. 1972) (en banc) (potential college students not allowed to register because of hair length), *cert. denied*, 411 U.S. 986, 93 S.Ct. 2268, 36 L.Ed.2d 964 (1973), certainly we must have scrupulous regard for principles of federalism in extending the reach of "constitutional common law." *See generally* Monaghan, *Constitutional Common Law*, 89 Harv.L.Rev. 1, 45 (1975) ("The general guarantees of due process and equal protection are so indeterminate in character that to develop on their authority a body of subconstitutional law would be to go beyond *implementation* to recognize a judicial power to create a sub-order of liberties without any ascertainable constitutional reference points") (emphasis in original).

RIVES, Circuit Judge, with whom GOLDBERG and AINSWORTH, Circuit Judges, join (dissenting):

With deference to the en banc majority, I adhere to the original majority opinion and decision reported as *Ingraham v. Wright*, 5 Cir. 1974, 498 F.2d 248, and make a few additional comments. The district court's "Findings of Fact" were quoted in the original opinion at 498 F.2d 253, 254, and the facts were more fully detailed at 498 F.2d 254–258. At the close of the plaintiffs' case the district court dismissed all three counts, holding as to Count Three, the class action, that the plaintiffs had shown no right to relief, and as to Counts One and Two that a jury could not lawfully find that either James Ingraham or Roosevelt Andrews had sustained a deprivation of federal constitutional rights. The en banc court now affirms. On original hearing we reversed and remanded for further proceedings. Reconsidering the law and the undisputed facts, I remain convinced that our original decision is right.

I. *Baker v. Owen.*

In the present case the panel's majority opinion and Judge Morgan's dissenting opinion were entered on July 29, 1974 (498 F.2d 248). Since then another case involving the corporal punishment of a sixth grader, Russell Carl Baker, has been heard by a three-judge District Court of the Middle District of North Carolina on January 13, 1975, opinion entered April 23, 1975, judgment entered June 13, 1975, and on appeal judgment affirmed by the Supreme Court on October 15, 1975. *Baker v. Owen*, M.D.N.C. 1975, 395 F.Supp. 294, *aff'd* — U.S. —, 96 S.Ct. 210, 46 L.Ed.2d 137. The Supreme Court did not leave to implication but ordered in express terms that "the *judgment* is affirmed." (Emphasis added.) The judgment of the three-judge district court, entered nearly two months after the entry of its opinion, was not included in the report of the opinion. The judgment reads as follows:

"Now, therefore, consistent with the amended opinion it is ORDERED, ADJUDGED, AND DECREED that:

"1. North Carolina General Statute § 115–146, on its fact, is declared not to be in violation of the Constitution of the United States.

"2. Defendants, their agents and servants, and their successors, are permanently enjoined in the administration of corporal punishment in the public schools of the State of North Carolina to conform to the minimal due process requirements of the Fourteenth Amendment as follows:

"(a) Except for those acts of misconduct which are so anti-social or disruptive in nature as to shock the conscience, corporal punishment may never be used unless the student was informed beforehand that specific misbehavior could occasion its use, and, subject to this exception, it should never be employed as a first line of punishment for misbehavior. The requirements of an announced possibility of corporal punishment and an attempt to modify behavior by some other means—keeping after school, assigning extra work, or some other punishment—will insure that the child has clear notice that certain behavior subjects him to physical punishment.

"(b) A teacher or principal may punish corporally only in the presence of a second school official (teacher or principal), who must be informed beforehand and in the student's presence of the reason for the punishment. The student need not be afforded a formal opportunity to present his side to the second official; this requirement is intended only to allow a student to protest, spontaneously, an egregiously arbitrary or contrived application of punishment.

"(c) An official who has administered such punishment must provide the child's parent, upon request, a written explanation of his reasons and the name of the second official who was present.

The above minimal due process requirements are not intended to prevent or dissuade the state from further elaboration upon necessary requirements in order to accomplish fairness in administration.

"3. The parties shall bear their own costs."

As to paragraph numbered 1 of the judgment, the opinion at 395 F.Supp. 303 shows that the plaintiffs made no claim "that corporal punishment *per se* violates the eighth amendment prohibition of unusual punishment"; that "His teacher, a female, administered two licks to his buttocks with a wooden drawer divider . . .," and that

"In short, this record does not begin to present a picture of punishment comparable to that in *Ingraham, supra* [5 Cir. 1974, 498 F.2d 248], at 255–59, or in *Nelson v. Heyne*, 491 F.2d 352 (7th Cir. 1974), which we believe indicate the kinds of beatings that could constitute cruel and unusual punishment if the eighth amendment is indeed applicable." 395 F.Supp. at 303.

The district court posed, but did not decide the issue of whether the Eighth Amendment applies to the corporal punishment of school children. 395 F.Supp. at 303.

As to paragraph numbered 2 of the judgment, the district court's opinion made clear the substantive due process constitutional right which made it necessary to inquire as to the type of procedure to be employed:

"The initial inquiry must be whether Russell Carl has a liberty or property interest, greater than de minimis, in freedom from corporal punishment such that the fourteenth amendment requires some procedural safeguards against its arbitrary imposition. Only if such an interest is found must we proceed to an inquiry as to the type of procedure to be employed. *See generally Goss v. Lopez, supra*, 419 U.S. [565] at 574, 95 S.Ct. 729 [1975]; *Board of Regents v. Roth*, 408 U.S. 564, 570–71, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 342, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969) (Harlan, J., concurring).

"We believe that Russell Carl does have an interest, protected by the concept of liberty in the fourteenth amendment, in avoiding corporal punishment. This conclusion is compelled by a conflux of many premises and postulates. . . .

"Having concluded, upon due consideration of all the above factors, that North Carolina school children have a liberty interest, we must decide what procedural safeguards should protect it." 395 F.Supp. at 301, 302.

Relevant to the present appeal, the Supreme Court in affirming the judgment of the district court held that so long as the force used is reasonable, corporal punishment does not violate the Eighth Amendment. It left undecided the issue of whether the Eighth Amendment applies to the corporal punishment of school children.

Acknowledging my indebtedness to Judge Morgan for calling to my attention that only the plaintiffs appealed to the Supreme Court and that no appeal was taken from paragraph 2 of the judgment, I agree that the Supreme Court's affirmance of the judgment did not bind this Court as to paragraph 2. Nonetheless, I submit that paragraph 2 was correctly decided by the district court for the reasons well stated in its opinion.

Some further discussion of the several issues seems warranted.

II. *Cruel and Unusual Punishment.*

The en banc majority holds that the cruel and unusual punishment clause of the Eighth Amendment has no application to corporal punishment administered to public school children by teachers or administrators regardless of the circumstances or the severity of the punishment. I agree with the contrary holding of the Eighth Circuit in *Bramlet v. Wilson*, 1974, 495 F.2d 714, 717, for the reasons stated in footnote 20 to the original opinion, 498 F.2d at 259, 260.

The en banc majority makes brief reference to the legislative history of the Eighth Amendment. That history is sketchy and inconclusive at best. The first ten amendments were proposed to the legislatures of the several states by the First Congress on September 25, 1789, and were ratified December 15, 1791.

In *Brown v. Board of Education*, 1954, 347 U.S. 483, at 489, 490, 74 S.Ct. 686, 98 L.Ed. 873, the Supreme Court discussed the history of the Fourteenth Amendment with respect to segregated schools as of the time of the adoption of that Amendment in 1868. The rationale of that discussion applies with multiplied intensity to the history of the Eighth Amendment as of 1791 with respect to corporal punishment in the public schools. As the *Brown* opinion demonstrates, public education was in its infancy in 1868. In 1791 it was almost nonexistent.[1] Chief Justice Warren, writing for a unanimous Court in *Brown*, said:

"In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* [163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256] was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws." 347 U.S. at 492–493, 74 S.Ct. at 691.

Similarly, in *Trop v. Dulles*, 1958, 356 U.S. 86, 101, 78 S.Ct. 590, 598, 2 L.Ed.2d 630, with specific reference to the constitutional phrase "cruel and unusual" as used in the Eighth Amendment, Chief Justice Warren said: "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."

In *Nelson v. Heyne*, 7 Cir. 1974, 491 F.2d 352, *cert. denied* 417 U.S. 976, 94 S.Ct. 3183, 41 L.Ed.2d 1146, that expression was quoted and applied by the Seventh Circuit to a "[s]chool, located in Plainfield, Indiana [which] is a medium security state correctional institution for boys twelve to eighteen years of age, *an estimated one-third of whom are non-criminal offenders.*" 491 F.2d at 353, 354 (emphasis added). The Seventh Circuit held that corporal punishment consisting of beating juveniles with a fraternity paddle, causing painful injuries, was cruel and unusual punishment. While it recognized that the school was both a correctional and an academic institution (491 F.2d at 354), it did not exclude from its holding the "non-criminal offenders."

It is likely that in 1791 the federal government meted out punishment solely in retribution for crimes. The scope of the Amendment was greatly expanded after it became binding on the states through the Fourteenth Amendment. *Louisiana ex rel. Francis v. Resweber*, 1947, 329 U.S. 459, 463; *Robinson v. California*, 1962, 370 U.S. 660, 666, 82 S.Ct. 1417, 8 L.Ed.2d 758. The Seventh Circuit in *Nelson v. Heyne, supra*, aptly called attention that,

"*In re Gault*, 387 U.S. 1, 15–16, 87 S.Ct. 1428, 1437, 18 L.Ed.2d 527 (1967), the Court stated:

"'The early reformers were appalled by adult procedures and penalties, and by the fact that children could be given long prison sentences and mixed in jails with hardened criminals. . . . The child was

1. At the time of the American Revolution, schools were predominantly private and denominational. 7 Encyclopedia Britannica, History of Education 991 (1970). The main outlines of the public educational system were not achieved until the middle of the Nineteenth Century. *Id.* at 992.

to be "treated" and "rehabilitated" and the procedures, from apprehension through institutionalization, were to be "clinical" rather than punitive.'"

491 F.2d at 358.

Thus it is not surprising that there should be so little in the history of the Eighth Amendment relating to its intended effect on corporal punishment in the public schools. Today, government has greatly expanded and provides a multitude of social institutions and public services. The administration of punishment is no longer confined to a criminal setting. It is now employed in public schools, *see Bramlet v. Wilson, supra;* homes for delinquents, *see Nelson v. Heyne, supra, Morales v. Turman,* E.D. Tex.1974, 383 F.Supp. 53, 70–72, and *Collins v. Bensinger,* N.D.Ill.1974, 374 F.Supp. 273; mental institutions, *see Welsch v. Likins,* D.Minn.1974, 373 F.Supp. 487; and even in processing passport applications, *see Trop v. Dulles, supra,* 356 U.S. at 88, 78 S.Ct. 590. To paraphrase from Chief Justice Warren in *Brown, supra,* 347 U.S. at 492, 74 S.Ct. 686, in approaching this problem, we cannot turn the clock back to 1791.

The majority's other objection to applying the cruel and unusual punishment clause of the Eighth Amendment to this case appears to be one of federalism:

> ". . . if the force used by defendant teachers in disciplining plaintiff was as severe as plaintiffs allege, a Florida state court could find defendants civilly and criminally liable for tortious conduct exceeding the level of severity authorized by 232.27 of Fla.Stat.Ann. and by Dade County School Board policy 5144. The basis of such actions is, however, tort and criminal law, *not* federal constitutional law. We find it neither proper nor necessary to expand the Eighth Amendment beyond its intended and reasonable scope to encompass an action which is essentially based on the commission of a battery." 525 F.2d 915.

It has been the province and duty of the federal courts since *Marbury v. Madison,* 1803, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60, to interpret the Constitution and protect constitutional rights. The presence of alternative remedies in state courts should not deter federal judges from their primary duty of defending and supporting the Constitution. *Cf. Monroe v. Pape,* 1961, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492. The claims for relief here involved were brought by plaintiffs under 42 U.S.C. § 1983, which derives from the Civil Rights Act of 1871. In the landmark case construing § 1983, *Monroe v. Pape, supra,* the complaint alleged, *inter alia,* that thirteen Chicago police officers broke into the plaintiffs' home in the early morning, routed them from bed, made them stand naked in the living room, and ransacked every room, emptying drawers and ripping mattress covers. 365 U.S. at 169, 81 S.Ct. 473. Like the corporal punishment in our present case, these acts were, among other tortious conduct, "essentially based on the commission of a battery." The possibility of criminal law proceedings and tort claims against these policemen in state court was found to be no answer, as the federal remedy provided by § 1983 is supplementary to any state remedy. *Id.* at 183, 81 S.Ct. 473. On that score, *Monroe v. Pape, supra,* was followed by *McNeese v. Board of Education,* 1963, 373 U.S. 668, 671, 672, 83 S.Ct. 1433, 10 L.Ed.2d 622, and by many decisions of the courts of appeals and of the district courts, some of which are collected in 42 U.S.C. § 1983 n. 500. I cannot escape the conclusion that these school children have a constitutional right to freedom from cruel and unusual punishment when applied under color of state law, and that it is our duty as federal judges to enforce that right.

III. *Substantive Due Process.*

The district court found that "'alternative measures in use range from parent and student conferences, the use of guidance counselors and psychologists, where available, to suspension and ex-

pulsion.'" (498 F.2d at 264. See also footnote 32 which follows.) In the original panel majority opinion, we noted that,

> "The defendants apparently concede that corporal punishment in Dade County is a relatively serious punishment. In their brief they state that 'Corporal punishment in the public schools of Dade County, Florida, is a last resort means of discipline as an alternative to suspension or expulsion . . .' (Defendants' Brief, p. 17.)" 498 F.2d at 267.

The administration of cruel and severe corporal punishment can never be justified. The circumstances and severity of the beatings disclosed by the presently undisputed evidence amounted to arbitrary and capricious conduct unrelated to the achievement of any legitimate educational purpose. Such conduct, exercised under color of state law, deprived the plaintiffs of both property and liberty without due process of law.

I submit that the en banc majority errs in the following part of its opinion:

> "Having determined that corporal punishment itself and corporal punishment as circumscribed by the guidelines in Policy 5144 is not arbitrary, capricious, or unrelated to legitimate educational goals, we refuse to look at each individual instance of punishment to determine if it has been administered arbitrarily or capriciously. We think it a misuse of our judicial power to determine, for example, whether a teacher has acted arbitrarily in paddling a particular child for certain behavior or whether in a particular instance of misconduct five licks would have been a more appropriate punishment than ten licks. We note again the possibility of a civil or criminal action in state court against a teacher who has excessively punished a child.[8]
>
> "[8] Indeed, Policy 5144, as effective during 1970–71, provides in part: 'The person administering the corporal punishment must realize his own personal liabilities if the student being given corporal punishment is physically injured.'"

525 F.2d p. 917. That is in effect to hold that corporal punishment more severe than that "circumscribed" by the Florida Statute § 232.27 and by Dade County School Board Policy 5144 is not done under color of state law. Obviously the conduct of public school teachers or administrators purportedly exercised under authority granted by a state statute and school board regulation is not *excluded* from federal constitutional scrutiny simply because the severity of the beatings exceeded the prescription of the state law. That is implicitly, if not expressly, held in *Baker v. Owen, supra. See also Jackson v. Bishop,* 8 Cir. 1968, 404 F.2d 571, 579, 581, discussed in the original panel opinion at 498 F.2d 261, 262 n. 26. In *United States v. Classic,* 1941, 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368, a criminal action against Louisiana election officials for falsifying election returns, the Supreme Court held that defendants were acting under color of state law when they falsified the returns. These acts, the Court found, were committed "in the course of their performance of duties under the Louisiana statute requiring them to count the ballots, to record the result of the count, and to certify the result of the election." 313 U.S. at 325–326, 61 S.Ct. at 1042–1043. The Court further stated that:

> "Misuse of power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law. [Citations omitted.] *Id.* at 326, 61 S.Ct. at 1043.

In *Monroe v. Pape, supra,* this definitional view of the words "under color of" was adopted for the civil rights action provided by 42 U.S.C. § 1983. 365 U.S. at 184, 185, 61 S.Ct. 1031. Clearly, the teachers and administrators who administered the spankings in this case did so under color of state law. The fact that they might have misused the power vested in them by the state to administer corporal punishment by inflicting more blows and blows more severe than prescribed does not alter the basic fact that

these beatings were performed by officials clothed with state authority.

Monroe v. Pape, supra, in discussing the legislative history of the Civil Rights Act which gave birth to 42 U.S.C. § 1983, commented:

> ". . . the remedy created was not a remedy against it [the Ku Klux Klan] or its members but against those who representing a State in some capacity were *unable* or *unwilling* to enforce a state law.
>
> . . . . . .
>
> "There was, it was said, no quarrel with the state laws on the books. It was their lack of enforcement that was the nub of the difficulty." (Emphasis that of the Court.) 365 U.S. at 175–176, 81 S.Ct. at 478.

Likewise, in the present case, there is no quarrel with the restrictions on the severity of corporal punishment expressed in the Florida Statute 232.27 and those stated in the Board Policy 5144. "It was their lack of enforcement that was the nub of the difficulty." 365 U.S. at 176, 81 S.Ct. at 478. The district court found that

> "'There has been a rather widespread failure to adhere to School Board policy regarding corporal punishment. Teachers have punished students without first consulting with their respective principals. More blows have been administered to students than authorized by the policy.'" 498 F.2d at 254.

The original panel properly deemed it "more important to know how corporal punishment is actually administered than to know the relevant rules or regulations." 498 F.2d at 261. The en banc majority would separate sharply the moderate kind of corporal punishment authorized by the Florida Statute and the Board Policy from the severe beatings administered to the plaintiffs Roosevelt Andrews and James Ingraham and to a few other students.

The original panel recognized the difficulty, or perhaps impossibility, of controlling the severity of corporal punishment (498 F.2d at 261, 262 n. 26). I submit that the arbitrary, excessive and severe corporal punishment disclosed by the plaintiffs' evidence, thus far undisputed, amounts to a denial of substantive due process of law.

IV. *Procedural Due Process.*

In the light of the district court's opinion in *Baker v. Owen, supra*, it seems clear that the plaintiffs have been denied procedural due process. The circumstances and severity of the beatings disclosed by the plaintiffs' evidence were such as to require the basic right to a hearing of some kind under either the "severe and grievous" or the "de minimis" test. The two tests were contrasted in the latest Supreme Court pronouncement on procedural due process, *Goss v. Lopez*, 1975, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725, and the de minimis test was adopted, "that as long as a property deprivation is not *de minimis*, its gravity is irrelevant to the question whether account must be taken of the Due Process Clause." 419 U.S. at 576, 95 S.Ct. at 737. (citations omitted).

In the present posture of this case, the undisputed evidence discloses much more than a de minimis deprivation of property rights. It shows deprivations of liberty, probability of severe psychological and physical injury, punishment of persons who were protesting their innocence, punishment for no offense whatever, punishment far more severe than warranted by the gravity of the offense, and all without the slightest notice or opportunity for any kind of hearing. Repetition from a few examples should suffice. James Ingraham claimed that he was innocent and refused to be paddled. Principal Wright administered at least twenty licks,[2] while Assistant Principals Deliford and Barnes held James by his arms and legs and placed him struggling face down across a table. "The district court found that James Ingraham 'received 20 licks with a wooden paddle, which produced a painful and serious hematoma on his buttocks.' (R. 1561)." 498 F.2d at 256 n. 10. "On October 14, eight days after the paddling, this doctor indicated that James should rest at home 'for next 72 hours.' James testified that it was painful even to lie on his back in the days following the paddling, and that he could not sit comfortably for about three weeks (Tr. 149)." 498 F.2d at 256. Was James' loss of more than 10 days from school any less a deprivation of property because it resulted from a beating instead of a formal suspension?

Roosevelt Andrews' numerous paddlings were for offenses no more serious than being late or not "dressing out" (498 F.2d at 256). Roosevelt on one occasion insisted that he was innocent and refused to bend over. Barnes pushed him against the urinals and hit him on his arm, back and neck. Roosevelt complained to Principal Wright, but to no avail (498 F.2d 257).

Daniel Lee was struck four or five times on the hand for no offense whatever. His hand was X-rayed and, according to Daniel, a bone in his right hand was found to be fractured. The district judge observed an enlargement of his right knuckle (498 F.2d 258). Other instances of violation of procedural due process are set out in 498 F.2d at 258, 259. The brutal facts of this case should not be swept under the rug. Clearly, according to the presently undisputed evidence, the plaintiffs have been subjected to cruel and unusual punishment. Under color of state law, they have been arbitrarily deprived of both property and liberty. Even more clearly, they have been denied procedural due process.

The precedent to be set by the en banc majority is that school children have no federal constitutional rights which protect them from cruel and severe beatings administered under color of state law, without any kind of hearing, for the slightest offense or for no offense whatsoever. I strongly disagree and respectfully dissent.

2. Four times the five licks held to constitute cruel and unusual punishment in *Nelson v. Heyne, supra*, 491 F.2d at 354.

Ruby CONWAY et al.,
Plaintiffs-Appellees,

v.

CHEMICAL LEAMAN TANK LINES, INC., Defendant-Appellant,

The Fidelity & Casualty Company of New York, Intervenor-Appellee.

No. 74-2856.

United States Court of Appeals, Fifth Circuit.

Jan. 7, 1976.

Diversity action was brought for wrongful death by the widow, sons and employer of deceased. The United States District Court for the Eastern District of Texas, at Beaumont, Joe J. Fisher, Chief Judge, entered judgment against defendant, which appealed. The Court of Appeals, Gee, Circuit Judge, held that in view of Texas statute, evidence of surviving spouse's ceremonial remarriage was admissible and its exclusion was not harmless; on retrial case would be tried under the Federal Rules of Evidence under which the evidence would still be admissible although jury could not consider the same, under Texas law, for purpose of mitigating damages.

Affirmed in part and reversed and remanded in part.

1. Courts ⇐376

Texas Supreme Court's decision on applicability of Texas statute relating to admission of evidence of a ceremonial